(29,686)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1923

## No. 376

STATE OF MISSOURI EX REL. THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

WILSON A. TAYLOR, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1923

[fol. 1] IN THE

# SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

No. 23417

STATE OF MISSOURI at the Relation and to the Use of the ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Relator,

vs.

WILSON A. TAYLOR, Judge of the Circuit Court of the City of St. Louis, Respondent.

## PRÆCIPE FOR TRANSCRIPT OF RECORD

To Hon. J. D. Allen, Clerk of the Supreme Court of Missouri:

In obedience to the command of the writ of error issued in said cause from the Supreme Court of the United States to the Supreme Court of the State of Missouri, on the 28th day of May, 1923, you will please send to the Supreme Court of the United States as commanded in said writ, the following record of the proceedings and matters in said cause, to-wit:

1. Petition for Writ of Error.

2. Writ of Error and your return endorsed on same.

3. Assignment of Errors.

4. Citation to Respondent and acknowledgment of service on said citation.

5. Transcript of record filed in said cause, including the petition or application for prohibition, and including also the exhibits referred to and included in said application, marked "Exhibits A," "B," "C" and "D."

6. Return of Respondent, Taylor, to the Writ of Prohibition.

[fol. 2] 7. Motion for judgment.

8. Opinion of the Court En Banc.

9. Dissenting opinion of Graves, Judge.

10. Relator's Motion for Re-hearing and Suggestions in Support thereof.

11. Order overruling Motion for Re-hearing.

12. Order of Missouri Supreme Court on petition for Writ of Error, ordering said Writ.

13. Bond on Writ of Error.

State ex Rel. St. Louis, Brownsville and Mexico Railway Company (Plaintiff in Error), By Edward J. White, James F. Green, Attorneys.

Receipt of a copy of the foregoing Præcipe is hereby acknowledged this 28th day of May, 1923.

Leahy, Saunders & Walther, Attorney- for Respondent (Defendant in Error).

[fol. 2½] [File endorsement omitted.]

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[fol. 3] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME

Your Petitioner, the State of Missouri, presenting this application on behalf of the St. Louis Brownsville and Mexico Railway Company, respectfully states, that on the 30th day of April, 1923, the Supreme Court of the State of Missouri entered in the above-entitled cause its final order and judgment in favor of the above-named respondent and against this petitioner, in which final order and judgment and the proceedings theretofore had in this cause petitioner avers certain errors were committed to the prejudice of this petitioner, all of which will more in detail appear from the assignment of errors hereto attached and made a part hereof; that the Supreme Court of the State of Missouri is the highest court of said State of Missouri in which the decision in this matter could be had.

Wherefore, your petitioner prays a Writ of Error from the Su-
[fol. 4] preme Court of the United States may issue in its behalf to the Supreme Court of the State of Missouri for the correction of the errors so complained of, and that a transcript of record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this 23rd day of May, 1923.

Edward J. White, James F. Green, Attorneys for Petitioner (Plaintiff in Error). Merrit N. Hayden, Thomas T. Railey, Of Counsel.

Writ of Error allowed in the above-entitled cause upon the execution of a bond on behalf of petitioner in the sum of One Thousand Dollars, said bond when approved to act as a supersedeas herein.

Dated this 23rd day of May, 1923.

A. M. Woodson, Chief Justice Supreme Court of Missouri.

[fol. 4½] [File endorsement omitted.]

[fol. 5] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

WRIT OF ERROR

The President of the United States to the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the case of State of Missouri at the relation and to the use of the St. Louis, Brownsville and Mexico Railway Company, as Relator, against Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, Case No. 23417, in the said Supreme Court before you, said court being the highest court of law or equity in said State wherein a decision could be had, final judgment having been rendered April 3, 1923 and relator's motion for re-hearing having been overruled April 30, 1923; manifest error is alleged to have happened, to the damage of said relator, as by its complaint appears.

Now, therefore, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, [fol. 6] you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. not exceeding thirty (30) days from and after the date of the citation in said cause in the said Supreme Court, to be then and there held, that the record and proceedings being inspected the said Supreme Court may cause further to be done therein to correct said error, according to the laws and customs of the United States, what of right should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States this 28th day of May, 1923.

Issued at office in the City of Jefferson, with the seal of the District Court of the United States for the Central Division of the Western District of Missouri on the date last aforesaid.

Edwin R. Durham, Clerk of the United States District Court, Western District of Missouri, Central Division, By F. J. Fr—, D. C. [Seal of the United States District Court, Central Division, Western District of Missouri.]

This Writ of Error allowed.

A. M. Woodson, Chief Justice of the Supreme Court of Missouri.

[fol. 7] STATE OF MISSOURI, sct:

IN THE SUPREME COURT OF MISSOURI

RETURN TO WRIT OF ERROR

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, in obedience to the mandate of the within writ of error, and in conformity with the præcipe for record, herewith transmit to the Honorable Supreme Court of the United States a true and complete transcript of the record and proceedings in the cause entitled State of Missouri, at the relation and to the use of the St. Louis, Brownsville and Mexico Railway Company, Relator, vs. Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, No. 23,417, so far as called for by the said præcipe, and as fully as the same remain of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 8th day of June, 1923.

J. D. Allen, Clerk of the Supreme Court of the State of Missouri. [Seal of the Supreme Court of Missouri.]

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[fol. 8] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the State on behalf of the St. Louis, Brownsville and Mexico Railway Company, as Petitioner for Writ of Error as set out in its petition which is hereto attached, and respectfully submits, that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled cause, there is manifest error in this, to-wit:

I

That the decision of the Supreme Court is in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States, delegating to Congress the power to regulate commerce between the several States, in this, to-wit: that Congress, through the Carmack Amendment, has taken jurisdiction over all matters relating to loss or damage to interstate freight, thereby superseding the State laws and regulations with respect thereto, and that the Supreme Court of Missouri in permitting a plaintiff to resort to the State statutes in order to maintain a suit against said non-resident Railway Company, thereby adding to and supplementing substantial

rights afforded by the Federal statute and denying to the Railway Company substantial rights afforded it under the Federal law, has [fol. 9] contravened the rule announced in the following authoritative decisions, to-wit:

Railway Co. v. Varnville, 237 U. S., 604.
Railway Co. v. Winfield, 244 U. S., 153.

II

Because the Supreme Court of Missouri erred in holding that although the right of the American Fruit Growers, Inc. to sue the St. Louis, Brownsville and Mexico Railway Company arose and accrued under Federal law, to-wit, the Carmack Amendment to the Interstate Commerce Act, and although the said Railway Company was not a resident of Missouri and had no agent in the State on whom personal service could be had, a suit could be maintained against it under the attachment laws of said State.

III

Because the Supreme Court of Missouri, in holding that the bringing in of a non-resident defendant by attachment and without personal service involved only a matter of procedure as opposed to substantial or substantive rights, denied to the St. Louis, Brownsville and Mexico Railway Company the substantial right afforded it by the Federal law to have said suit tried in a jurisdiction where personal service could be had upon it, and in so holding, said Supreme Court of Missouri denied to said Railway Company the equal protection of the law, and such holding is a taking of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

IV

Because said Supreme Court in treating as a mere matter of procedure the attachment of the property by the St. Louis, Brownsville and Mexico Railway Company, a non-resident defendant, without personal service upon it in a suit based upon the Carmack Amendment to the Interstate Commerce Act, ignored and directly contravened the principles announced in the following decisions, to-wit:
[fol. 10] Pryor v. Williams, 254 U. S., 43.
Ry. Co. v. White, 238 U. S., 511.
Ry. Co. v. Gray, 241 U. S., 338.
Pratt v. Ry. Co., 284 Fed. Rep. 1007.

V

Because the Supreme Court of Missouri erred in holding that the provision of the Carmack Amendment to the effect "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law" preserve to the shipper the right to resort to the State statutes

for the purpose of maintaining by attachment a suit against a non-resident defendant upon whom no personal service has been obtained in an action for loss and damage to interstate freight, and in so holding, the Supreme Court of Missouri directly contravened the following authoritative decisions, to-wit:

Southern Express Co. v. Byers, 240 U. S., 612.
Adams Express Co. v. Croninger, 226 U. S., 503.
Lysaght v. Lehigh Valley R. Co., 254 Fed., 351.

Edward J. White, James F. Green, Attorneys for Petitioner (Plaintiff in Error). Merrit N. Hayden, Thomas T. Railey, of Counsel.

[fol. 10½] [File endorsement omitted.]

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[fol. 11] IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

CITATION AND SERVICE

The United States of America to Wilson A. Taylor, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the date this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri wherein the said State at the Relation of the St. Louis, Brownsville & Mexico Railway Company, is Plaintiff in Error and you are Defendant in Error, to show cause, if any, there be, why the judgment rendered against said Plaintiff in Error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

In testimony whereof, I, A. M. Woodson, Chief Justice of the Supreme Court of Missouri have hereto signed my name this 23rd day of May, A. D. 1923.

A. M. Woodson, Chief Justice.

Copy of the above citation received May 28th, 1923.
Leahy, Saunders & Walther, Attys. for Deft. in Error.

[fol. 11½] [File endorsement omitted.]

[fol. 12] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that heretofore, to-wit, on the 30th day of September, 1922, there was filed in the office of the clerk of the Su-

preme Court of the State of Missouri, in a cause between State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company, Relator, and Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Respondent, No. 23,417, the transcript of the record in said cause, which said transcript of record is in the words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1923

In Banc

[Title omitted]

Transcript of Record

Relator filed its application for a writ of prohibition against respondent, who is one of the Judges of the Circuit Court of the City of St. Louis. This application (caption and signatures omitted) is as follows:

APPLICATION FOR WRIT OF PROHIBITION

Your petitioner presents to this court its application for a writ of prohibition against respondent, who is Judge of the Circuit Court [fol. 13] of the City of St. Louis, Missouri, presiding in Division No. 1 of that Court, and for its cause of action states that it is a railway corporation duly organized and existing under and by virtue of the laws of another state than the State of Missouri; is a nonresident of the State of Missouri; has its principal place of business within the State of Texas, and only operates a line of railroad in said State of Texas:

That the American Fruit Growers, Inc., is a corporation existing under and by virtue of the laws of some State other than the State of Missouri and maintains an office for the transaction of business in said City of St. Louis;

That heretofore, to wit, on or about the 13th day of June, 1921, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in a certain cause, No. 46,156, in which American Fruit Growers, Inc., was plaintiff and The St. Louis, Brownsville & Mexico Railway Company was defendant, in which said cause on or about the last named date there was also filed an affidavit wherein it was set out that The St. Louis, Brownsville & Mexico Railway Company was a nonresident of the State of Missouri, and also on or about December 2nd, 1921, an alias writ of attachment was issued in said cause, whereby on the date last mentioned the Illinois Central Railroad Company was summoned as garnishee and whatever goods, chattels, moneys, effects, rights, credits, choses in action and evidences of debt in the possession of said Illinois Central Railroad Company, garnishee, and belonging to The St. Louis, Brownsville & Mexico Railway Company were attached by the Sheriff of the said City of St. Louis by virtue of the alias writ of attachment herein-

[fol. 14] before referred to, as will more fully apear by certified copies of the petition, affidavits in attachment, alias writ of attachment and return of the Sheriff of the said City of St. Louis on said alias writ of attachment. all of which are herewith attached, and marked "Exhibits A, B, C and D," and made a part of this application;

That The St. Louis, Brownsville & Mexico Railway Company, defendant in said suit No. 46156, was at all times a common carrier of freight and passengers for hire over its own line and lines of other carriers known as connecting carriers between points on its own lines and points on the lines of such connecting carriers in all of the states within the United States, and was at all such times engaged in interstate commerce and the transportation of freight and passengers from one state into another state of the United States;

That the damages prayed for in the petition filed in said case No. 46156 grow out of certain shipments of freight originating on the line of The St. Louis, Brownsville & Mexico Railway Company in the State of Texas and destined to Pittsburgh, Pennsylvania, Cleveland, Ohio, and St. Louis, Missouri, respectively, and each of said shipments, in order to reach its final destination, moved over other lines of railroad than the line of railroad of The St. Louis, Brownsville & Mexico Railway Company and through other states than the State of Texas, and said shipments in moving to their final destinations moved over the lines of railroad hereinbefore referred to as connecting carriers.

Your petitioner says, further, that The St. Louis, Brownsville & [fol. 15] Mexico Railway Company, as required by law, issued what is known as a through bill of lading, covering each shipment hereinbefore referred to, by virtue of the provisions of which said shipment was to be transported by means of the initial carrier and connecting carriers from points of origin to final destinations;

That at the time The St. Louis, Brownsville & Mexico Railway Company, as initial carrier, undertook the transportation of the shipments mentioned in the petition in said case No. 46156, there was in force and effect an Act of Congress, approved January 29th, 1906, Chap. 3591, par. 7, 34 State. at Large, 584, known as the Carmack Amendment to the Interstate Commerce Act, by which it was provided:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Further, your petitioner says that it is not alleged in the petition [fol. 16] filed in said case No. 46156, where the alleged damage to the shipments therein referred to occurred on the line of the initial carrier or lines of connecting carriers over which said shipments moved in order to reach final destination.

Further, your petitioner shows to the Court that in said case No. 46156, pending in the Circuit Court of said City of St. Louis, there has been no service of process on the defendant therein, The St. Louis, Brownsville & Mexico Railway Company, and said defendant has not entered its appearance in said cause nor filed any pleadings therein, but that the plaintiff in said cause, without the service of process on the defendant therein and without the appearance of the defendant in said cause, is attempting by virtue of the provisions of the laws and statutes of the State of Missouri, and by a proceeding in attachment under and by virtue of the laws of said State of Missouri, to subject the money and property of the defendant in said cause to the satisfaction and payment of said alleged cause of action set forth in the petition therein, and by means of a garnishment issued in aid of such attachment to subject whatever moneys that may be owing by the Illinois Central Railroad Company to the defendant in said cause to the satisfaction of said alleged cause of action.

Also, your petitioner alleges that by virtue of the remedy given against the initial carrier by the terms of the act of Congress above referred to, suit cannot be maintained in the jurisdiction of state in which personal service of process cannot be had upon said initial carrier, unless it is alleged in the petition that the loss or damage on account of which suit is brought occurred while the shipments were [fol. 17] in the actual possession of said initial carrier and that the right of attachment given by the statutes of the State of Missouri against nonresidents has no application, such attachments not being allowed as a Federal remedy unless personal service is had upon the nonresident defendant.

Your petitioner also avers that inasmuch as the shipments mentioned in the petition filed in the Circuit Court of said City of St. Louis are interstate shipments, the liability of the defendant in that action as an initial carrier is measured by the laws of the United States and remedies provided by the different acts of Congress applicable thereto, and not by the laws of the State of Missouri or by any statute enacted by or in force in said state.

Therefore, it is shown to this Court by your petitioner that inasmuch as the shipments set out in the petition in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, are interstate in character; that said shipments, in order to reach final destinations, moved through different states and over other lines of railroad than operated by the St. Louis, Brownsville & Mexico Railway Company; that no personal service of process has been had upon the defendant in said suit No. 46,156; that the defendant in said last-named suit has neither entered its appearance nor filed any pleading therein; that it is not alleged in the petition in said case No. 56,156 that the

loss or damage on account of which this suit is brought occurred while said shipments, or any of them, were in the actual possession of the defendant in said suit; that whatever remedy the plaintiff in said suit No. 46,156 may have is a Federal remedy only, and that the [fol. 18] provisions of the statutes of the State of Missouri in the matter of attachments against nonresidents of said state are not open to plaintiff in said suit No. 46,156 as a Federal remedy, the Circuit Court of the City of St. Louis, Missouri, has no jurisdiction either of the subject of the action or the person of the defendant in said suit No. 46,156.

Your petitioner avers that, notwithstanding that said Circuit Court of said City of St. Louis is without jurisdiction of the person of the defendant or the subject of the action in said case No. 46156, Hon. Wilson A. Taylor, Judge of Divison No. 1 of said Circuit Court, is attempting to exercise jurisdiction in said cause No. 46156 in that respondent is about to permit plaintiff in said cause to file interrogatories; require the garnishee therein to answer said interrogatories, and to permit the plaintiff in said cause to subject whatever properties or effects in the hands and possession of said garnishee to be subjected to the payment of any judgment plaintiff may recover in said cause after said plaintiff shall have compiled wth the provisions of the statutes of the State of Missouri in the matter of attachments against the property of those not residing within the State of Missouri, and that to permit the Hon. Wilson A. Taylor to attempt to exercise jurisdiction in said cause would, in view of the matters and things hereinbefore alleged, be a denial to petitioner of the equal protection of the laws and would be the taking of the property of your petitioner without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner avers that it is without adequate remedy in the [fol. 19] premises to prevent the unlawful exercise of jurisdiction by respondent in said cause other than by prohibition to be issued by this Honorable Court.

Wherefore, your petitioner pays that this Honorable Court will issue against the respondent, Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, its writ of prohibition restraining and preventing him from hearing or taking further cognizance or action in said cause of American Fruit Growers, Inc., v. St. Louis, Brownsville & Mexico Railway Company, No. 46156, pending for hearing before said respondent, and that said respondent, pending the final hearing of this cause, be prohibited and restrained from taking any cognizance or action in said suit pending before him, and that upon final hearing of this cause said prohibition against respondent may be made absolute.

[fol. 20] EXHIBIT "A" TO APPLICATION FOR WRIT OF PROHIBITION

STATE OF MISSOURI,
City of St. Louis, ss:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, OCTOBER TERM, 1921

No. 46156. Div. No.—

AMERICAN FRUIT GROWERS, INC., Plaintiff,

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, a Corporation, Defendant

PETITION

Plaintiff states that it is a corporation duly organized according to law and as such was engaged in the business of buying and selling fruits and vegetables, and in the course of its business shipped large quantities of such fruits and vegetables over the railroad lines of various railway companies, and more particularly over that of the defendant.

Plaintiff further states that the defendant is and at all times hereinafter mentioned was a railroad corporation and common carrier, organized and existing under and by virtue of the laws of the State of Texas, and was engaged, among other things, in the transportation of fruits and vegetables over its lines through the State of Texas.

Plaintiff, for its cause of action, states that on or about the 30th day of April, 1920, one George A. Arts, as consignor, in the City of [fol. 21] La Feria, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier under an agreement, for transportation a carload of bulk cabbage in good, sound, merchantable condition, weighing about twenty-nine thousand six hundred thirty pounds (29,630); that the said cabbage had been sold by the said consignor to the plaintiff as consignee. That the said cabbage was transported by the said defendant in Northern Pacific car 94604, with destination as Pittsburgh, Pa.

Plaintiff further states that in violation of its common-law duty as a common carrier the defendant transported the said shipment of cabbage so negligently and carelessly that the said carload of cabbage arrived at its destination at Pittsburgh, Pa., spoiled, deteriorated and decayed, so that it was useless and unmerchantable, and the plaintiff was unable to realize anything on the same in the cabbage market; that by reason of the premises the plaintiff sustained a loss in the sum of one thousand twenty-eight dollars and five cents ($1,028.05). The market value of the said cabbage, in good, sound and merchantable condition on the day of its arrival at Pittsburgh, Pa., was one thousand twenty-eight dollars and five cents ($1,028.05); that by reason of the fact that the said cabbage was worthless and unmerchantable because of the violation of the said defend-

ant of its said common-law duty, the plaintiff was deprived of the said sum of one thousand twenty-eight dollars and five cents ($1,028.05), with interest, for which sum, together with its costs, it prays judgment.

[fol. 22] Count II

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a second cause of action herein, states that on or about the 20th day of April, 1920, George A. Arts, of Mercedes, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of bulk cabbage in good, sound, merchantable condition, weighing about twenty-five thousand seven hundred fifty-six (25,756) pounds, at Mercedes, Texas. That the said car was designated as car Lehigh Valley 36016, and the said car was transported to Cleveland, Ohio, by the said defendant. That this plaintiff had purchased the said carload of cabbage and was the consignee under the said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the carelessness and negligence of the defendant, the said carload shipment of cabbage arrived at its destination at Cleveland, Ohio, in a yellow, deteriorated and decayed condition, so that a large part of it was useless and unmerchantable, thereby forcing this plaintiff to sell the said carload of cabbage for the sum of three hundred dollars ($300.00); that the market price of similar cabbage of like grade and quality in good, sound, merchantable condition on the day of the arrival of the said shipment of cabbage at Cleveland, Ohio, namely, May 8, 1920, was nine hundred four dollars sixty-one cents ($904.61). That by reason of the said violation of the defendant of its common-law duty and of its negligence and carelessness, the plaintiff was forced to sell the [fol. 23] said carload of cabbage at a loss of six hundred four dollars sixty-one cents ($604.61), for which sum, together with interest and costs of this suit, the plaintiff prays judgment.

Count III

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a third cause of action herein, states that on or about the 21st day of January, 1921, Hodge and Howell, of Harlington, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of carrots, beets, cabbage, lettuce and spinach, in good, sound, merchantable condition, consisting of twenty-four (24) crates of cabbage, thirty-two (32) baskets of carrots, twenty-three (23) crates of beets, seventy-one hampers (71) of lettuce, two hundred twenty (220) hampers of spinach, and eighteen (18) crates of carrots. That the said car

was designated as A. R. T. 9271, for transportation to St. Louis, Missouri. That this plaintiff had purchased said car of cabbage, carrots, beets, lettuce, and spinach, and was the consignee under said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the negligence and carelessness of the defendant, as hereinafter set out, the said carload of vegetables arrived at its destination in a spoiled, deteriorated and unmerchantable condition, and that the plaintiff was forced to sell said cabbage, carrots, beets, lettuce and spinach at a loss of three hundred thirty dollars [fol. 24] and twenty-two cents ($330.22). That the reasonable and fair market value of twenty-seven (27) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition would have been five dollars ($5.00) per crate, but because of its condition plaintiff was forced to sell same for seventy dollars and seventy-two cents ($7-.72). That the reasonable and fair market value of thirty-three (33) baskets of carrots on the day of its arrival at St. Louis in good, sound, merchantable condition would have been nineteen dollars and twenty cents ($19.20), but because of its condition plaintiff was forced to sell same for seventeen dollars and twenty cents ($17.20). That the reasonable and fair market value of twenty-four (24) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition was fifty-four dollars ($54.00), but because of its condition plaintiff was forced to sell same for forty-one dollars and ninetey-two cents ($41.92). That the reasonable and fair market value of seventy-one (71) hampers of lettuce on the day of its arrival at St. Louis in good, sound, merchantable condition was one hundred eighteen dollars and ninety-two cents ($118.92), but because of its condition plaintiff was forced to sell same for sixty-four dollars and eighty cents ($64.80). That the reasonable and fair market value of two hundred twenty (220) hampers of spinach on the day of its arrival at St. Louis in good, sound, merchantable condition was two hundred nine dollars ($209.00), but because of its condition plaintiff was forced to sell same for fifty-five dollars thirty-one cents ($55.31). That the reasonable and fair market value of sixty-six (66) baskets of beets on the day of its arrival in good, sound, merchantable condition was [fol. 25] eighty-two dollars and fifty cents ($82.50), but because of its condition plaintiff was forced to sell same for sixty-two dollars ($62.00).

Wherefore, by reason of all the above, plaintiff prays judgment in the sum of three hundred thirty dollars twenty-two cents ($330.22), together with interest and cost of this suit.

The total amount prayed for in the above three counts is one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,-962.88).

EXHIBIT "B" TO APPLICATION FOR WRIT OF PROHIBITION

STATE OF MISSOURI,
City of St. Louis, ss:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, OCTOBER TERM, 1921

No. —. Div. —

AMERICAN FRUIT GROWERS, INC., Plaintiff,

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, a Corporation, Defendant

Affidavit for Attachment

J. W. Willem, agent and attorney in fact for American Fruit Growers, Inc., of legal age, being duly sworn, states that he is the agent and attorney in fact for American Fruit Growers, Inc., that the said American Fruit Growers, Inc., has a just demand and claim against the within named defendant, the St. Louis, Brownsville & Mexico Railway Company, a corporation, as set forth in the above [fol. 26] petition, and that the amount which the said deponent believes the plaintiff ought to recover after allowing all just credits and set-offs is the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,962.88), with interest thereon; that the said defendant is a foreign corporation and not a resident of the State of Missouri, and the said defendant cannot be served in this state in the manner prescribed in the Revised Statutes of Missouri, 1919, but that the said defendant is a corporation whose chief office or place of business is out of the State of Missouri, to wit, in the State of Texas.

(Signed) J. N. Willem.

Sworn to and subscribed before me this 11th day of June, 1921. My commission expires February 25, 1923. (Signed) Lillie A. Wolf, Notary Public, City of St. Louis, Mo. (Seal.)

A true copy.
Attest: Nat Goldstein, Clerk. (Seal.)

[fol. 27] EXHIBIT "C" TO APPLICATION FOR PROHIBITION

Sheriff Directed to Attach Railway Company's Property

CITY OF ST. LOUIS:

The State of Missouri to the Sheriff of the City of St. Louis, Greeting:

We again command you to attach The St. Louis, Brownsville & Mexico Railway Company, a corporation, by all and singu-

lar its lands, tenements, goods, chattels, rights, moneys, (Seal.)
credits, evidences of debt and effects, or so much thereof as
shall be sufficient to satisfy the plaintiff's claim as sworn to, to wit, the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents, with interest and costs of suit, in whose hands or possession soever the same may be found in your bailiwick, and that you summon the said The St. Louis, Brownsville & Mexico Railway Company, a corporation, to appear at the next term of the Circuit Court before the Judges thereof, on the first day of said term, to be holden at the City of St. Louis, on the first Monday of February next, then and there to answer the action of the plaintiff, American Fruit Growers, Inc., as set forth in the annexed petition, and also that you summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of the defendant may be, or who may be named by the plaintiff or its attorney as garnishees, and particularly —— ——, that they be and appear before the Judges of our said court on the [fol. 28] first day of the term aforesaid, then and there to answer unto what may be objected against them, and have you then and there this alias writ.

Witness, Nat Goldstein, clerk of our said court, with the seal thereof hereunto affixed, at office in City of St. Louis, this 2nd day of December, in the year of our Lord nineteen hundred and twenty-one.

Nat Goldstein, Clerk. (Seal.)

EXHIBIT "D" TO APPLICATION FOR PROHIBITION

Sheriff's Return

No goods, chattels or real estate found in the City of St. Louis, Mo., belonging to the within named defendant, St. Louis, Brownsville & Mexico Railway Co., a corporation, whereon to levy the writ hereto attached and make the debt and costs, or any part thereof; thereupon, by order of the attorney for plaintiff, I executed said writ, in said City of St. Louis, at the hour of 8 o'clock and 40 minutes, a. m., on the 3rd day of December, 1922, by declaring in writing to Illinois Central Railroad Company, a corporation by delivering said written declaration, directed to said corporation to M. J. Mulconnery, chief clerk of said corporation, he being in the business office of said corporation and having charge thereof, that I attached in its hands all debts due from it to said defendant. . , and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt, of, belonging to, the said defendant. . , or so much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and by summoning it in writing as garnishee, and I, at the same time, by said direction, further executed said writ by [fol. 29] summoning said corporation as garnishee, by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation, to said M. J. Mulconnery, chief clerk thereof, that I summoned it to appear before the Circuit Court for the City of St. Louis, at the courthouse in said city, at the return

term of said writ, to wit, on the first Monday of February next, to answer such interrogatories as might be exhibited and propounded to it by the within named plaintiff.

The president or other chief officer of said corporation could not be found in the City of St. Louis at the time of service.

Chas. E. Mohrstadt, Sheriff of the City of St. Louis, By Joe Goldsmith, Deputy. Gar. & N. B. $1.50 due. St. Louis, Mo., 2-6-1922.

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[fol. 30] CERTIFICATE OF CLERK OF CIRCUIT COURT

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the city and state aforesaid certify the foregoing to be a full, true and complete copy of the petition filed June 13th, 1921, in the cause wherein American Fruit Growers, Inc., is plaintiff and the St. Louis, Brownsville & Mexico Railroad Company, a corporation, is defendant, being cause No. 14,065, Series "B," of the causes in this court, together with the affidavit for attachment filed with said petition, the alias writ of attachment, and the Sheriff's return thereon, as fully as the same remain on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the City of St. Louis, this 21st day of February, 1922.

Nat Goldstein, Clerk Circuit Court.

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After consideration, this Court, on the 11th day of March, 1922, issued its preliminary rule in prohibition in usual and proper form, prohibiting respondent from proceeding further in said cause No. 46,156, until the further order of this Court.

To this rule respondent made return, which return (caption and signatures omitted) is as follows:

[fol. 31] IN THE SUPREME COURT OF MISSOURI

RETURN ON SUGGESTION OF PROHIBITION TO THE SUPREME COURT DIRECTED AGAINST WILSON A. TAYLOR, JUDGE OF THE CIRCUIT COURT, CITY OF ST. LOUIS, MISSOURI

Now comes Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, and making return to the writ of prohibition herein, shows unto the Court that, in the matter concerning which he has been cited to appear, he was proceeding in the proper exercise of his jurisdiction in such matters, conferred upon him by law, and that there is no reason in law why the rule heretofore made upon him to show cause should be made absolute.

The respondent further states that the petition filed by the relator does not state facts sufficient to constitute a cause of action in prohibition in that it shows on its face, first, that the original petition filed in the cause below was an ordinary suit setting out that the defendant negligently transported a shipment of cabbage so that it arrived at its destination spoiled, deteriorated and decayed, and that the plaintiff was damaged thereby.

Second. That there is nothing in the petition of the plaintiff below which sets out that this suit is brought under the Carmack Act.

Third. That there is nothing in the Carmack Act which prohibits the bringing of suits of attachment.

Fourth. That the Carmack Act expressly provides that nothing in the section of the act "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Wherefore, having fully answered herewith, respondent prays [fol. 32] that the temporary order of prohibition be dissolved and that respondent herein be ordered to further proceed with the said cause, and that this respondent be discharged hence with his costs.

Relator thereupon filed its motion for a judgment on the pleadings, which motion (omitting caption and signatures) is as follows:

IN THE SUPREME COURT OF MISSOURI

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now relator and states to the Court that in the return filed herein by respondent there is no statement controverting the allegations of fact set forth and pleaded in the application of relator for prohibition filed herein, and said return states no facts authorizing the Court to quash the preliminary rule in prohibition issued in said cause.

Wherefore, relator prays for judgment on the pleadings and that the preliminary rule issued herein may be made absolute.

[fol. 33] And thereafter, on the 2nd day of April, 1923, the following further proceedings were had and entered of record in said cause, to-wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

JUDGMENT

In Banc

[Title omitted]

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the preliminary rule in prohibition heretofore issued herein be discharged, and that the writ of prohibition prayed for herein be denied, and that the said respondent recover against the said relator his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said plaintiff is in the words and figures following to-wit:

[fol. 34] IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

OPINION, BLAIR, J.

This is an original proceeding in this court, whereby, upon petition of relator, we issued our preliminary rule in prohibition against respondent as judge of division one of the circuit court of the city of St. Louis, commanding him to appear and show cause why he should not be prohibited from hearing or taking further cognizance of or action in a certain cause pending in division one of said circuit court, wherein American Fruit Growers, Inc. (hereinafter referred to as plaintiff) is plaintiff and relator in this case is defendant.

The return of respondent is in effect a demurrer to the petition, upon which our preliminary rule issued. It raises no issue of fact, but asks that the preliminary rule be discharged because the petition does not state facts sufficient to constitute a cause of action in prohibition. Relator filed its motion for judgment on the pleadings.

[fol. 35] The contention of relator is that the plaintiff in the case pending in the said circuit court is seeking to hold relator liable in damages as the initial carrier in certain interstate shipments under the Carmack amendment to the interstate commerce act for loss sustained by plaintiff on certain carload shipments made from points in the state of Texas to points outside said state over the lines of relator and connecting carriers. Relator has no line of railroad outside of Texas and has no office in Missouri and no agent in this State through whom personal service upon it can be obtained. Attachment was issued and the Illinois Central Railroad Company was summoned as garnishee.

Relator contends that the plaintiff under its petition is seeking to hold it liable for damages caused by the negligence of its connecting carriers; that plaintiff's right to proceed for such negligence is a right conferred by the Carmack amendment and is a Federal right and can only be enforced by means of remedies granted by the Federal law; that under the Federal rule such suits can only be maintained in the district wherein personal service can be had upon relator and that attachment cannot be maintained unless such personal service can also be obtained; that the same rule applies in the

state courts in cases brought under the Carmack amendment as obtains under the Federal rule.

On the other hand, respondent contends that the petition states a cause of action for damages against relator only upon its common law liability as a common carrier for its own negligence and does not predicate relator's liability upon its liability as the initial carrier under the Carmack amendment; that even if said petition does seek [fol. 36] so to hold relator, there is nothing in the amendment depriving state courts of the procedural right to attach the property of the carrier found within the jurisdiction of the state court, without regard to whether or not personal service can be had upon such carrier.

It therefore becomes necessary to examine the petition filed in the circuit court to determine the nature of the suit. Such petition is in three counts. The first count alleges that on April 30, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by one George A. Arts from La Feria, Texas, to Pittsburg, Pennsylvania, over the railroad line of relator and was purchased by the plaintiff and it became consignee thereof and that in violation of its common law duty as a common carrier relator so negligently and carelessly transported said carload of cabbage that it was spoiled, deteriorated and decayed so that it was useless and unmerchantable and a total loss upon its arrival at destination. Judgment is prayed for the market value of such cabbage.

The second count alleges that on April 20, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by George A. Arts over relator's railroad line from Mercedes, Texas, to Cleveland, Ohio, and was sold to plaintiff, who became consignee thereof, and, in violation of its common law duty as a common carrier and through relator's carelessness and negligence, said carload of cabbage arrived at destination in a yellow, deteriorated and decayed condition, so that a large part thereof was useless and unmerchantable, causing loss to plaintiff, for which it prays judgment. [fol. 37] The third count alleges that on January 21, 1921, Hodge and Howell at Harlington, Texas, consigned over relator's railroad a carload shipment of vegetables, consisting of carrots, beets, cabbage, lettuce and spinach in good, sound, merchantable condition to St. Louis, Missouri, and that plaintiff purchased said carload of vegetables and became consignee thereof; that in violation of relator's common law duty as a common carrier and through its carelessness and negligence said carload of vegetables arrived at destination in a spoiled, deteriorated and unmerchantable condition; and that plaintiff was forced to sell same at a loss, for which it prays judgment. The total damages sought to be recovered in the three counts is $1,962.88.

That portion of the amendment to the act to regulate commerce known as the Carmack amendment, which is involved here, is found in chapter 3591 of the U. S. Statutes at Large, Vol. 34, part 1, at page 595. It reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to

a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

[fol. 38] "That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

It is obvious that the foregoing provisions did not change the liability of any carrier for its own negligence in handling shipments over its own lines (Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S., l. c. 326), but required the receiving or initial carrier to issue a bill of lading to destination, whether such shipment was wholly over its own lines or over its own lines and those of connecting carriers and enabled the shipper or holder of such bill of lading to look to such receiving carrier for recovery for loss, damages or injury to such shipment whether caused by such receiving carrier or any connecting carrier moving it enroute to destination. It simply makes the connecting carriers agents of the receiving carrier and makes it answerable for their negligence or acts causing loss, damage or injury, with the right in the receiving carrier to recover from the carrier at fault for any loss paid under such bill of lading. The evident purpose of such amendment was to do away with the necessity of the holder of a bill of lading making an investigation to determine which carrier was a fault, if other than the receiving carrier moved the shipment, and to leave the question of ultimate liability to be settled among themselves by the interested carriers.

[fol. 39] I

Does the petition state a cause of action under the Carmack amendment? We think it does. Relator has no railroad line outside the state of Texas and since it accepted the shipments for destinations outside the state of Texas, part of the haul was over lines of connecting carriers, although such fact is not specifically alleged in plaintiff's petition. The three counts of the petition in the case pending before respondent are substantially alike in respect to the character of the shipments. They were consigned over the railroad of relator from different stations in Texas to destinations outside of Texas. Take the first count as characteristic of all. It does not allege that relator issued a receipt or bill of lading to destination, but does allege that the shipper placed the shipment in the possession of relator and the

same was transported by it in a certain specified car with destination Pittsburgh, Pennsylvania. This is equivalent to an allegation that relator issued a through bill of lading to said destination. Relator received the shipment for transportation from a point within one state to a point within another state. In such case the carrier is required by the amendment to issue a through bill of lading and the presumption will be indulged that relator did what the law required it to do. Relator could not have limited its liability to loss, damage or injury occurring upon its own lines if it had attempted to contract to that effect when it undertook to transport the shipment over its own and connecting lines. (Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, l. c. 205.)

[fol. 40] There is nothing in the allegation that "in violation of its common law duty as a common carrier the defendant transported the said shipment so negligently and carelessly" that said shipment arrived at destination spoiled, etc., which confines the plaintiff to proof of negligence of relator upon its own railroad line. There is no allegation that the negligence occurred while the shipment was on the line of relator. For anything appearing in the petition, the damage may have been caused while the shipment was on the line of a connecting carrier outside of Texas. Absent allegations to the contrary, the statement that loss or damage occurred to a shipment moving over two or more connecting railroads, the petition should be construed as charging that the loss or damage was caused by the delivering carrier, since the presumption is that such loss occurred on the lines of such delivering carrier, unless the contrary is alleged or proven. (Chicago & N. W. Ry. Co. v. C. C. Whitmack Produce Co., 42 Sup. Ct. Rep. 328; Charleston & Car. R. R. v. Varnville, 237 U. S. 597, l. c. 602.)

Nor is the situation changed by the fact that the petition alleges the loss was occasioned by carelessness and negligence and in violation of the common law duty of relator as a common carrier. Such negligence is clearly within the Carmack amendment. It does not change the common law duly of the carrier. Plaintiff need not have alleged that the loss was due to negligence. All that was necessary was to allege the delivery of the shipment to relator in good, sound condition and its delivery at destination in bad condition. The carrier is liable under the common law for all loss or damage not caused by the act of God or the public enemy, unless due to the inherent nature or quality of the shipment or the fault of the shipper [fol. 41] or owner. (10 C. J. 110.) With the foregoing exceptions the carrier is answerable in damages for loss incurred enroute, including its own negligence. The Carmack amendment makes the acts of connecting carriers the acts of the receiving carrier and their negligence its negligence so far as the shipper or owner is concerned. Our conclusion is that the petition sufficiently alleged facts which, if proven, would compel relator to respond in damages for loss occurring upon the lines of its connecting carriers, as well as upon its own line, and that the petition, absent definite allegation that the damage occurred on relator's line of railroad, states a cause of action under the Carmack amendment.

## II

It must next be determined whether plaintiff can proceed against relator under such amendment in the courts of this State by attachment when personal service cannot be had upon it here. Relator contends for the application of the Federal rule, that attachment can only be maintained where the court has jurisdiction over the person of the defendant. (Big Vein Coal Co. v. Read, 229 U. S. 31; Laborde v. Ubarri, 214 U. S. 173; Ex parte Railway Company, 103 U. S. 794; Toland v. Sprague, 12 Peters, 300, l. c. 329.)

On the other hand, respondent contends that suit may be maintained by attachment in the state court under the Carmack amendment, regardless of jurisdiction of the court over the person of a defendant in the same manner as in an ordinary action; that the shipper had such right before the Carmack amendment under the interstate commerce law and the statutes of this State and that such rights were preserved to the shipper by the provision in the Carmack amend-
[fol. 42] ment "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." Relator contends this provision preserves only the remedy or right of action under existing Federal law.

In Adams Express Company v. Croninger, 226 U. S. 503, Mr. Justice Lurton said:

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

In Lysaght v. Lehigh Valley R. Co., 254 Fed. 351, Hand, Judge, said:

"The phrase 'existing law' means existing common law as understood in the federal courts, and excludes changes effected by state statutes."

In Southern Express Co. v. Byers, 240 U. S. 612, Mr. Justice McReynolds said:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts."

[fol. 43] See also Southern Ry. v. Prescot, 240 U. S. 632, l. c. 639; N. Y. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34-38; Charleston & Car. R. R. v. Varnville Co., 237 U. S. 597-603.

The quotation above made from Mr. Justice Lurton in the Croninger case illustrates the character of rights and remedies preserved by the proviso. Under the pre-existing Federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing Federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton, the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state courts also, well and good. The proviso did not take it away.

[fol. 44] It is the expressed public policy of the Federal Government not only not to restrict the jurisdiction of the state courts in the enforcement of the provisions of the interstate commerce act, but on the contrary to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the Federal courts without regard to the amount involved. (36 Stats, at Large, pp. 1901 and 1902, Sec. 24, Par. 8th.) The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.

Again it is provided in the Federal employers' liability act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the Federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the Federal courts.

Relator insists that because Congress has not given the Federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack amendment gives the holder of a bill of lading a right to proceed in the state court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the [fol. 45] state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner

as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced." The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the Federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the Federal courts have jurisdiction to try cases upon removal from the state courts where goods are attached and defendant has not been personally served when the same court does not have original jurisdiction to do so. There is nothing in the Carmack amendment indicating a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used.

The precise question appears to be new so far as either the Federal or State appellate courts are concerned. Two cases are cited by relator bearing squarely upon the question. Both cases were decided by trial courts. There is before us an unofficial copy of an opinion written by United States District Judge Page Morris in the case of Pratt v. D. & R. G. W. R. Co. and C. St. P. M. & O. R. Co., et al., Garnishees (said by counsel for relator to be reported in 284 Fed. 1007). The above opinion is based upon an opinion written by Judge Crump, Presiding Judge in the Law and Equity Court at Richmond, Virginia, in a case entitled, Neale v. Illiois Central, de-[fol. 46] cided December 28, 1921, and so far as we are aware not anywhere officially reported. The facts in both cases are quite similar to those in the case before us and our concurrence in the conclusions therein reached would dispose of this case adversely to the jurisdiction of the respondent. The cases are in no wise controlling upon us and are only persuasive authority in so far as we conclude they are well reasoned. Since Judge Morris rested his conclusion upon the reasoning of Judge Crump, the opinion of the latter is the one to be chiefly considered. The reasons controlling the conclusion reached by Judge Crump appear in the following quotation from his opinion as quoted by Judge Morris:

" 'It seems to be that those prominent features of the federal law show plainly that a proceeding in foreign attachment under the statutes of Virginia, cannot give the right to the court to pass upon the liability of the initial carrier, unless it is brought before the court by proper process or voluntarily appears. The principal defendant in such a proceeding would be deprived of the right to rebut the presumption against it, although the loss or damage occurred on the line of a connecting carrier, and the ascertainment of the amount of the plaintiff's claim, as a preliminary to subjecting the foreign defendant's property to its payment, would not be a judgment upon which the initial carrier could recover against the connecting carrier. It is now well settled that the cause of action arising under the Interstate Commerce Act may be enforced by the appropriate remedy in a

state court, but it would be denying to the initial and the connecting [fol. 47] carrier, ultimately liable, due process of law, for the court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

The heart of the argument is that "it would be denying to the inital and the connecting carrier, ultimately liable, due process of law, for the court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

Numerous illustrations could be given where the same reasons might be urged as to the right of a plaintiff to proceed against a defendant, not personally served, where no possible doubt can exist about such plaintiff's right so to proceed. For example, A, residing in Missouri, holds a note endorsed to him by B, a resident of Texas, who received the note from C, the original payee. A, having been defeated in a suit against D, the purported maker of the note, on the ground that the note was a forgery, finds property belonging to B in Missouri, files suit against him here and attaches such property. Would any one contend that B is entitled to personal service and a personal judgment against him because he in turn must recoup his loss from C, the purported payee?

Again, A is in B's employ in Texas and is injured in that state by B's negligence. C has written an employer's liability policy indemnifying B against loss by reason of any judgment obtained against hip by his employees. After the injury C disclaims liability on the policy. A moves to Missouri and, there finding property belonging to B, files suit for damages and attaches such prop- [fol. 48] erty. Must the suit abate because B was not personally served and must look to a suit on the policy against C to recoup his loss?

Under both illustrations the plaintiff would be entitled to maintain the suit in this State and attach any property of the defendant found therein, regardless of personal service. Yet such seems to be the most decisive consideration in Judge Crump's reasoning. He does not base his ruling upon any language in the Carmack amendment which can be fairly construed as denying the right of attachment in the state court against the unserved non-resident initial carrier. He bases it upon the creation of a new liability under the act requiring the initial carrier to respond for loss or damage caused by a succeeding carrier and giving the initial carrier the right to recover against the carrier at fault. Yet, the liability thus created by the act is not essentially different, except in the manner of its creation, from the liability arising under the illustrations we have used. One is created by an act of Congress, the other by contract out of which such liability grows. The substantive rights of the initial carrier are not violated to any greater extent than are those of any defendant whose property is attached under comparable circumstances. Attachment affects the remedy. It is procedural in char-

acter, a means for enforcement of a right. The rights or liabilities growing out of a contract or inherent in it or created by a statute are not enlarged or diminished by the suing out of an attachment. As said by Mr. Justice Matthews in Pritchard v. Norton, 106 U. S., l. c. 129;

[fol. 49] "Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

We find ourselves unable to yield our concurrence in the conclusion reached by the learned Virginia judge or the learned United States district judge who adopted his opinion. Congress has encouraged the use of the state jurisdiction in cases arising under the interstate commerce act. It even gives effect to attachments in cases after removal, where such attachment could not have been maintained originally in the Federal courts. Our own statutes authorize the very character of proceeding we are here asked to prohibit. There is no language in the Carmack amendment which specifically denies the state courts the right to proceed as respondent has proceeded. It seems a strained and unnatural construction to put upon the amendment as it is written to hold that it denies the plaintiff the benefit of attachment without personal service upon the defendant. In the absence of an authoritative expression from the Federal appellate courts, we will not adopt a construction which tends to impair the efficiency of procedure authorized by our own statutes and designed to facilitate enforcement of lawful demands of the citizens of this State against residents of other states who have property here. [fol. 50] We hold that respondent is acting within his appropriate jurisdiction and order the preliminary rule discharged.

All concur, except Graves, J., who dissents in separate opinion.

David E. Blair. J.

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And on the same day, to-wit, the 2nd day of April, 1923, Graves, J., filed his dissenting opinion herein, which said dissenting opinion is in the words and figures following, to-wit:

[fol. 51] IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

DISSENTING OPINION, GRAVES J.

I do not concur in the views of my learned brother writing the majority opinion in ths case. I agree to the doctrine announced by

the Virginia Court, and the Federal Court, cited and discussed in the opinion. These cases rule, and they are the only cases upon the exact point involved here, that jurisdiction cannot be acquired as to a defendant not residing within the territorial jurisdiction of the court, by a foreign attachment, in cases arising under what is familiarly known as the Carmack Amendment. Applying the doctrine of these cases, our preliminary rule in prohibition should be made absolute.

## I

This is purely an action created by Federal law. This law for the first time created an absolute liability against the initial carrier. The petition in this case does not aver where the damage occurred, but it does aver that the freight was delivered in good condition to the initial carrier, and was damaged when delivered by the connecting carrier. There is no allegation that the damages occurred on relator's line. In this situation the presumption is that the property remained in good condition until the last moment when it could be harmed. Railway Co. v. Varnville Co. 237 U. S. 602. The action is clearly one based upon the Carmack Amendment, and is therefore a right of action arising under the laws of the United States. Wells Fargo & Co. v. Cuneo, 241 Fed. l. c. 727; Alabama [fol. 52] Great Southern Ry. Co. vs. American Cotton Oil Co. 229 Fed. 11.

This statute not only gives the shipper an absolute right of action against the initial carrier, but it gives the initial carrier a right of action over against the particular carrier which permitted the damages to be done. If a Federal Statute creates a right of action and suit is brought to enforce such right, such suit arises under the law creating the right. McCoon vs. Ry. Co. 204 Fed. 198; Alabama Great Southern Ry. Co. vs. American Cotton Oil Co. 229 Fed. 11.

## II

Like actions under the Federal Employers' Liability Act, suits under Carmack's Amendment can be brought in state courts, and if for less than $3,000.00 can not be removed therefrom to a Federal Court. Removal is prohibited by statute. U. S. compiled Statutes, 1918, sec. 1010. This, however, does not change the fact that the suit is one under a Federal law. Prior to the statute, (Carmack's Amendment) it is true, that there was a right of action against a railroad for damages to goods, which were transported by the railroad. But the peculiar right of action given by this statute did not exist. We mean the absolute right to sue for and recover against the initial carrier, the damages sustained, although the damages did not result from any personal act of the initial carrier. Under the Federal rule jurisdiction in Federal Courts could not be secured by a mere attachment proceeding. The defendant had to be within the territorial jurisdiction of the court, and personal service upon the defendant is required. There must be jurisdicton over the person of the defendant before attachment can be maintained under

the Federal rule. Big Vein Coal Co. vs. Read, 229 U. S. 31; Laborde vs. Ubarri, 214 U. S. 173; Ex Parte Railway Co., 103 U. S. 796.

Had the suit involved here been brought in the Federal Court in St. Louis, rather than the state court, as it was brought, it is clear that such Federal Court could acquire no jurisdiction under the cases, supra. Has the state court in actions based upon a Federal law, more power than a Federal Court in the same district? [fol. 53] This is the interesting query.

III

We are not inclined to think that we should rule (as the majority of opinion does rule) that the state court can obtain jurisdiction in a case of the character involved here, when the Federal Court in the same city could not acquire such jurisdiction. The majority opinion says that the action is one stated under the Carmack Amendment, as we have stated above, but says that the state court could acquire jurisdiction per force of the proviso contained in the Carmack Amendment, which reads: "Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It is reasoned that under previous or pre-existing Federal law, suit could be maintained against the connecting carrier for damages occasioned by it, and the amendment did not take away this right. We need not discuss this ruling by the majority, because no such case is involved here. The suit here is against an initial carrier, and for damages which under the pleadings, and inferences to be drawn from the language, were occasioned by the last connecting carrier. This right to sue the initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment. Upon this peculiar right there was no pre-existing law, and this is the right sought to be inforced in the case involved in our proceeding.

The foregoing may be somewhat adrift from what we think is the vital question here. Can a state court acquire jurisdiction in method not tolerated by the Federal Courts? It has been said that the Carmack Amendment not only creates a right, but furnished a remedy. Ry. Co. vs. Wallace, 223 U. S. l. c. 491. But be this as it may we must answer the question, does the statute allow the acquisition of jurisdiction in one way by a state court, which way can not be used by a Federal Court. The proviso to the statute speaks of rights preserved, but it has been ruled that "existing laws" as used in the [fol. 54] statute "means existing common law as understood in the Federal Courts, and excludes changes effected by state statutes": Lysaght vs. Ry. Co. 254 Fed. l. c. 353. Under no existing law could Federal Courts acquire jurisdiction of the cause by mere attachment, without personal service. If this be the meaning of "existing law" in this statute, then the right to obtain jurisdiction of the cause and of defendant in the method used was not a right given by "existing law." The "existing law," denied this method of acquiring jurisdiction. The cases as to attachment without personal service, we have cited, supra. One other view, and we are through. Of that next.

## IV

The right to sue out an attachment is a substantive right, and is not mere procedure. Especially is this true when attachment is used to obtain jurisdiction. In Butler v. Young, 1 Flippin l. c. 279 it is said:

"Care and caution will be used, that substantive rights given by the State laws shall not be confounded with what is mere practice in the State courts. In this connection I may mention, among other matters, the right to bring an absent or non-resident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the State, and, in my opinion, were not contemplated by Congress by the law in question to be given to parties in this court."

The foregoing was quoted with approval in Harland vs. United Lines Tel. Co. 40 Fed. l. c. 317. The force of it is that the acquisition of jurisdiction is substantive law, and not mere procedure. If it be substantive law, then in cases arising under a Federal Law, the rule of the Federal Courts must govern. Wherever substantive rights are involved in such cases the Federal rule must prevail. If the acquisition of jurisdiction is not a substantive right, it would be hard to find one. It has been ruled that "the question of burden of proof is a matter of substance and not subject to control by the laws of the several states," Ry. Co. vs. Harris, 247 U. S. 367; Baker, et al. [fol. 55] vs. Schaff, 211 S. W. l. c. 104 and the cases therein cited. So too the Federal rule as to what constitutes assumption of risk in personal injury cases is substantive law, to which the state courts must bow. Pryor vs. Williams, 254 U. S. 43, and cases therein cited.

So if the acquisition of jurisdiction by attachment is substantive law, and in view of the rulings, supra, we think it is, then the statutes or rules of the state do not control, but the Federal rule must be applied by the state court. If jurisdiction by foreign attachment is denied by Federal rule, then it must be denied by the state trying a case arising under a Federal law, notwithstanding the state rule or state statute may be different. By the Federal rule an attachment is merely an incident to the suit and personal service must be obtained. If the state court undertakes to try a case arising under a Federal law, it must follow the Federal rule in matters of substantive law. The state court is attempting to proceed without jurisdiction and our preliminary rule should be made absolute.

W. W. Graves, Judge.

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[fol. 56] And thereafter, on the 10th day of April, 1923, the said relator filed its motion for a rehearing in said cause, and suggestions in support thereof, which said motion and suggestions are in the words and figures following, to wit:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1922

En Banc

[Title omitted]

RELATOR'S MOTION FOR REHEARING

Comes now relator, and within the time required by the rules of this Court, files this motion for rehearing in the above-entitled cause for the reason that questions decisive of the case and duly submitted by counsel have been overlooked by the Court, as hereinafter more particularly stated, to wit:

[fol. 57]

1

That Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, and has thereby, in so far as substantive matters are concerned, superseded the state statutes and the state common law which in any manner attempt to prescribe, regulate or affect the liability for damage to interstate freight, either with respect to actions against the initial carrier or to actions against the carrier on whose line the damage actually occurred; that while the Carmack Amendment does specifically preserve to the shipper "any remedy or right of action which he has under existing law," yet under the authoritative rulings of the Supreme Court of the United States, this provision preserves to the shipper only the statutory and common-law rights existing under the federal law, and does not preserve to him rights that he previously had under the common law and statutes of the states; that this plaintiff, suing in a state court, upon a cause of action based upon the federal statute, is bound by the substantive limitations, and the substantive rights that would be afforded the defendant had the suit been filed in the federal courts, and that the attachment of a nonresident defendant's property without personal service upon him in a suit based upon a federal statute or the common law of the federal courts, and under circumstances which would not be permissible were the suit filed in a federal jurisdiction, affects and prejudices the substantive rights of the defendant and deprives him [fol. 58] of his property without due process of law, and abridges the privileges and the munities of a citizen of the United States in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2

That the issue in this case, according to the majority opinion, is whether the shipper had a right prior to the enactment of the Carmack Amendment, under the Interstate Commerce Law and the statutes of this state, to sue the initial carrier for damage which is presumed to have occurred upon the line of its connections, and whether such a right, if it existed, was preserved to the shipper by the provision of the Carmack Amendment to the effect "that nothing in this section shall deprive any holder of such receipt or bill of lading

of any remedy or right of action which he has under existing law;" that while the Court has not directly indicated its ruling upon this specific issue, its ultimate conclusion and Judge Graves' interpretation of the majority opinion in his dissenting opinion, indicate that this Court intended to hold that prior to the Carmack Amendment "the Interstate Commerce law or the statutes of this state" authorized suit against the initial carrier for damage occurring upon the line of its connections, and that such rights, if any, both federal and state, were preserved to the shipper by the specific provisions of the Carmack Amendment; that there was, as a matter of fact, no right, prior to the enactment of the Carmack Amendment, under the federal statutes or the federal common law, authorizing a shipper to sue the [fol. 59] initial carrier for the negligence of its connections, much less to begin such a suit by attachment, and that if this Court intends to permit plaintiff to predicate his cause of action upon the statutory or substantive common law of this state, or intends to permit him to piece out his federal right of action by resorting to the statutes or common law of the state with respect to matters other than mere procedure, then this opinion is in direct conflict with the authoritative decisions of the federal courts in the following cases, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

3

That the decision of this Court is in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States delegating to Congress the power to regulate commerce between the several states, in this, to wit: That Congress, through the Carmack Amendment, has taken jurisdiction over all matters relating to loss and damage of interstate freight, thereby superseding all state laws and regulations with respect thereto, and that this Court, in permitting plaintiff to resort to state statutes, hereby adding to and supplementing the substantive rights afforded by the federal statute, has directly contravened the rule announced in the following authoritative decisions, to wit: Ry. Co. v. Varnville, 237 U. S. 604; Ry. Co. v. Winfield, 244 U. S. 153, and Prigg v. Pennsylvania, 16 Pet. 617.

[fol. 60]

4

That this Court, in terming and treating as a mere matter of procedure the attachment of the property of a nonresident defendant, without personal service upon him in a suit based upon the Carmack Amendment to the Interstate Commerce Act, is ignoring and directly contravening the principles announced in the following authoritative decisions, to wit: Pryor v. Williams, 254 U. S. 43; Ry. Co. v. White, 238 U. S. 511; Ry. Co. v. Gray, 241 U. S. 338; Ry. Co. v. Harris, 247 U. S. 371; Slater v. Ry. Co., 194 U. S. 126; Harland v. Telephone Co., 40 Fed. 311, and Pratt v. D. & R. G. W. R. R. Co., 284 Fed. 1007.

Jas. F. Green, H. H. Larimore, Thos. T. Railey, Attorneys for Relator.

[fol. 61] IN THE SUPREME COURT OF MISSOURI

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

The correct determination of the question at issue involves several underlying issues and principles. First, has not Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, assumed jurisdiction over all claims for loss and damage to interstate freight, so that the common law and the statutes of the states are no longer applicable? Second, does the specific reservation in the Carmack Amendment to the effect that nothing in said section shall deprive a shipper of "any remedy or right of action which he has under existing law" preserve to him merely the rights that he had under the federal common law, or does it preserve to him rights that he previously had under the common law and statutes of the states? Third, where a plaintiff sues in a state court upon a transitory cause of action based upon a federal statute or upon the common law of the Federal Courts, is he not bound by all of the substantive rights that the defendant would be entitled to in the Federal Courts? Fourth, does not the bringing in of a nonresident defendant by attachment affect the substantive rights of the defendant, or is it a mere matter of practice and procedure which does not add to the substantive rights of the plaintiff, nor deprive defendant of substantial rights accorded him by the federal law.

We have, with some disappointment, failed to find any of these important underlying principles and issues either discussed or directly [fol. 62] answered in the majority opinion in this case. Lest, in our previous briefs, we may not have made our views clear to all of the Court, we will tersely restate them.

Congress, through the interstate Commerce Act, and particularly through the Carmack Amendment, assumed jurisdiction over all loss or damage to interstate freight. Any previously-existing rights with respect to interstate shipments based on state statutes or upon the state common law completely vanished upon the enactment of said statute. The act itself preserved to the shipper his previously-existing rights under the federal common law, but not his previously-existing rights under the state common law. There is, of course, a marked distinction in many respects between the federal common law and the state common law, respecting, for example, the burden of proof, the assumption of risk, etc. A plaintiff in a state court has a right to predicate his cause of action upon the federal statute or upon the federal common law, but in doing so, he must take the federal law as he finds it. He can use the machinery of the state—the state courts with their local rules of pleading and procedure—to enforce his federal rights, but he cannot resort to the statutes of the state or the common law of the state to obtain additional substantive rights or to deprive defendant of substantial rights which he would be entitled to were the suit prosecuted in the federal courts. He can enforce the federal law in the state courts just as he can enforce in one state a transitory action based upon a statute of another state, but he must take federal rights of action as he finds them, with the

[fol. 63] disadvantages as well as the advantages that would attach in the Federal Courts. It follows, therefore, that if the bringing in of a nonresident defendant by attachment involves a substantial or substantive right, as distinguished from mere procedure, defendant's property is being taken without due process of law.

With this brief statement of our contention in mind, we respectfully request that the Court carefully analyze the second proposition discussed in the majority opinion. Judge Blair, speaking for the Court, says:

"Respondent contends * * * that the shipper had such right before the Carmack Amendment under the Interstate Commerce law and the statutes of this state, and that such rights were preserved to the shipper by the provision in the Carmack Amendment 'that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' Relator contends this provision preserves only the remedy or right of action under existing Federal law."

The issue thus stated, we gather from the majority opinion, is the underlying point in dispute, and yet we have read and reread the majority opinion without being able to determine whether the Court has passed upon this question, much less how it has decided it. Does this Court intend to hold that the Carmack Amendment preserves to the shipper of interstate freight substantive rights that previously existed under either the state common law or the state statutes? To so hold would be in direct conflict with the three leading cases from which the Court quotes.

[fol: 64] We assume from the fact that the writ is dismissed that Judge Blair intends to so hold that the Carmack Amendment does not deprive shippers of substantial rights based upon the common law of the state, but we very much doubt that the other learned Judges who concurred in this opinion realize that they were agreeing to such a conclusion, if such is the case. We respectfully urge that this doubt should be cleared up, and that if it is the intention of this Court to decide this issue in what we deem direct conflict with the Federal decisions referred to, then we respectfully insist that this ruling should be in positive and unequivocal language. On the other hand, if it was not the intention to hold that the Carmack Amendment still preserves to the shipper substantial rights based upon the statutes and common law of the states, we are at a loss to understand on what ground the Court has found for respondent.

Furthermore, as emphasized by Judge Graves in his dissenting opinion, what such existing right did the shippers, at the time of the passage of the Carmack Amendment, have? A cause of action predicated upon the Carmack Amendment—and the majority opinion concedes that this is a suit based on the Carmack Amendment—is a statutory cause of action which did not exist at common law and which consequently did not exist at the time of the passage of the Carmack Amendment. To quote from the dissenting opinion:

"The suit here is against an initial carrier, and for damages which under the pleadings, and inferences to be drawn from the language, were occasioned by the last connecting carrier. This right to sue the [fol. 65] initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment. Upon this peculiar right there was no pre-existing law, and this is the right sought to be enforced in the case involved in our proceeding."

The majority opinion, after stating the aforesaid issue and citing cases on which this respondent is relying, without drawing its conclusions therefrom, then proceeds:

"Under the pre-existing federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault, and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state [fol. 66] courts also, well and good. The proviso did not take it away.

"It is the expressed public policy of the federal government not only not to restrict the jurisdiction of the state courts in the enforcement of the provisions of the interstate commerce act, but on the contrary to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved 36 Stats. at Large, pp. 1901 and 1902, Sec. 24, par. 8th). The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of *of* $3,000.

"Again, it is provided in the Federal Employers Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the federal courts."

This Court argues, supra, that the right to proceed in the state court was recognized by the federal law; it argues that Congress did

not intend to deprive the state courts of their power to enforce such rights; it argues that had Congress so intended to deprive the state courts of jurisdiction, it would have expressly so provided; it argues that "it is the expressed public policy of the federal government not only to restrict the jurisdiction of the state courts in the enforcement of the provisions of the Interstate Commerce Act but, on the [fol. 67] contrary, to encourage resort to the jurisdiction of the state courts"; and it cites as an example the provision of the Employers' Liability Act specifically authorizing suits thereon in the state courts.

We fully concur in all that the Court has to say, but what bearing does it have on this case? We are not disputing the right of this shipper to sue in the state courts on a federal transitory right of action, but what we are insisting is that if he elects to sue in the state court upon a federal right of action, he must take that right of action subject to all of the restrictions with respect to substantive matters that would be binding upon him if his suit were filed in the federal courts. For example, if a shipper sues in the courts of Missouri upon a cause of action created by the statutes of Kansas, he acquires that right subject to the limitations and interpretations that the Supreme Court of Kansas has placed upon it. If the Supreme Court of Kansas has held that it must be enforced in some particular manner, he cannot resort to the Missouri decision and to the Missouri statutes in support of his right to enforce it in this state in some other manner, if to do so would prejudice substantial rights that the defendant would have were the suit filed in the State of Kansas. The same rule is applicable where a shipper sues in the state courts on a federal right of action—he acquires that right of action subject to the restrictions with which it is surrounded by the policy and rulings of the federal courts. He cannot piece out the federal right of action by relying upon the public policy and the [fol. 68] common-law decisions of the forum. At no time have we questioned the right of this plaintiff to sue in the state courts, and yet the majority opinion treats this as one of the principal issues in the case.

The majority opinion proceeds:

"Relator insists that because Congress has not given the federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack Amendment gives the holder of a bill of lading a right to proceed in the state court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that 'When any suit shall be removed from a state court to a District Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which said suit was commenced.'

The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the federal courts have jurisdiction to try cases upon removal from the state courts where goods are [fol. 69] attached and defendant has not been personally served when the case court does not have original jurisdiction to do so. There is nothing in the Carmack Amendment indicating a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used."

We fail to appreciate the Court's analogy between the removal statute referred to and the point at issue in this case. The removal statute simply provides that where there has been valid and lawful service in the state court, even though begun in a manner which would not be recognized in an initial proceeding in the federal court, it shall be good upon removal to the federal court. Instead of this rule being against us, it is, as a matter of fact, directly in line with what we are contending. Service by attachment is more than a mere matter of procedure—it is a substantial or substantive right. It was not the intention of Congress that removal to the federal court should deprive plaintiff of such substantial rights afforded him by the courts in which his suit was properly brought. If his service by attachment was valid in the state court, it was the intention of Congress that this substantial right be protected upon removal to the federal court. It was not the intention of Congress, however, to authorize suit in the state court on a federal right of action to be begun by the attachment of a nonresident defendant's property, while at the same time prohibiting such right in the federal courts. All that the statute in question did was to protect the [fol. 70] substantive rights that the plaintiff was lawfully entitled to in the state courts prior to the removal, and Congress has not, either directly or impliedly, undertaken to extend the rights of such plaintiff with respect to any suit which could not otherwise be begun by the attachment of the property of an absent defendant.

This Court might just as plausibly argue that because Congress has seen fit to authorize suits in the state courts based upon the Federal Employers' Liability Act, that it has thereby impliedly sanctioned the application of the common law and public policy of the state with respect thereto, and yet the Supreme Court of the United States, discussing this question in such cases as Ry. Co. v. White, 238 U. S. 511, and Pryor v. Williams, 254 U. S. 43, has refused to permit the state courts to apply their rules with respect to burden of proof and assumption of risk, on the ground that substantive rights are involved.

It seems to us unreasonable that this Court should ignore well-established rules and precedents on the underlying issues in this case, and attempt to reason out from entirely irrelevant legislation

the presumed intention attributed to Congress. Nor are the reasons given for this presumed intention of the lawmakers well taken, for, as pointed out by Judge Graves in his dissenting opinion, "Has the state court in actions based upon the federal law, more power than the federal court in the same district?" In other words, was it the intention of Congress to permit a plaintiff to avail himself in the state court, in a suit based on the federal statute, of additional substantive rights not afforded him in a suit on the same statute in the [fol. 71] federal courts? To attribute such an intention to Congress would, in our opinion, be to consider Congress extremely inconsistent, to say the least. As a matter of fact, however, the statute referred to has nothing whatever to do with this case, either directly or by analogy.

The remaining portion of the majority opinion is devoted to a discussion of the decision of Judge Page Morris in Pratt v. D. & R. G. W. R. R., 284 Fed. 1007, and to the unreported opinion of Judge Crump, presiding Judge in the Law and Equity Court at Richmond, Virginia, in Neale v. Illinois Central. This Court rather disparagingly refers to Judge Morris' decision as "an unofficial copy of an opinion," notwithstanding the fact that it then proceeds to give reference to the volume and page of the Federal Reporter where the case is reported, and as a matter of fact, the case was printed in the Federal Advance Sheets of February 15th, and was in the bound volumes of the Federal Reporter at the time this opinion was handed down. We assume that Judge Crump hardly anticipated that his unreported opinion would be circulated broadcast, otherwise he would doubtless have expressed in detail the reasons leading up to his conclusions. As it stands, his opinion is largely in the nature of conclusions.

This Court, in characterizing the opinion of Judge Crump, states:

"The heart of the argument is that 'it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carriers, upon whom the statute places the burden of making defense for all the carriers concerned.' "

[fol. 72] We think that Judge Crump's opinion goes further than this, and that his conclusions are well taken. However, an examination of our briefs will disclose that we merely quoted the decision of Judge Crump, and did not present the case on the reasoning advanced by him.

The same was true in the presentation of the Pratt case before Judge Morris. The Pratt case was presented on the same briefs that have been filed in the case at bar, and the opinion of Judge Crump was quoted, but not commented upon. In other words, we argued the Pratt case, and we have argued this case, upon the theory outlined in the first few paragraphs of these "suggestions in support of the motion for rehearing." While Judge Morris, in the Pratt case, did quote and adhere to the views expressed by Judge Crump, yet this Court has apparently overlooked the fact that Judge Morris likewise considered the additional arguments which we advanced

before him and have urged before this Court, and in his opinion specifically held that:

"I believe that the right to bring an absent or nonresident defendant into court by publication or personal service outside the state affects the substantive rights of the defendant (see Harland v. Telephone Co. (C. C.) 40 Fed. 311, 6 L. R. A. 252)."

It will be noted from this Court's statement of the gist of Judge Crump's opinion that it is entirely distinct from the principal grounds we have presented in support of relator's application. Judge Crump, according to this Court, held that such an attachment was void because it would be denying to the initial carrier and the [fol. 73]connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carrier. There is nothing in our briefs in support of this argument other than the quotation of Judge Crump's opinion, but, on the contrary, we have stood upon the argument that the bringing in of a nonresident defendant by foreign attachment involves a substantive right not accorded the plaintiff by the common law of the federal courts, and that under the circumstances a plaintiff suing upon the federal statute in the state courts cannot avail himself of such additional substantive rights accorded by the common law of the states or by the state statutes, to the prejudice of the defendant. As stated, we think the conclusions reached by Judge Crump are correct, but even if they are not, the lengthy discussion of his opinion has no bearing upon the principal theory on which this case has been presented, briefed and argued.

This Court, in the concluding paragraph of the majority opinion, reiterates its views as to Judge Crump's decision, again refers to the federal removal statute, and to the fact that Congress has encouraged the use of the state courts, and in conclusion states that the Court will not adopt a construction which tends to impair "the efficiency of procedure authorized by our own statutes."

The primary point at issue has been and now is whether the bringing in of a nonresident defendant under such circumstances is a mere matter of procedure or whether it is the violation of a substantial or substantive right, and this Court, instead of passing upon [fol. 74] this question and considering the decisions cited by us which are directly in point, and the decisions of the Supreme Court of the United States applicable by analogy, has passed this issue without comment other than to refer to it in this concluding sentence as "procedure." If the bringing in of a nonresident defendant by attachment under such circumstances is a matter of procedure, we have frankly admitted and now admit that we have nothing further to argue. The issue is of such importance as to warrant a detailed expression of the views of this Court.

Concluding our suggestions in support of this motion for rehearing, we again respectfully insist that not a one of the several primary issues involved in this case has been discussed in the majority opinion of the Court. To reiterate, these issues are, first, whether Congress, through the Interstate Commerce Act, and particularly the Carmack

Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, so as to supersede all statutes and common law of the states otherwise applicable; second, whether the specific language of the Carmack Amendment reserving to the shipper "any remedy or right of action which he has under existing law" preserves to him the rights and remedies previously existing under the statutes and common law of the state; third, whether a plaintiff suing in the state court upon a transitory action afforded by a federal statute must take his right of action subject to all substantive rights that the defendant could avail himself of in the federal jurisdiction; and fourth, whether the bringing in of a nonresident defendant by attachment is such a substantial right as to amount to more than mere procedure.

[fol. 75] Until these primary issues have been answered by the majority, we hardly feel that the case has been given the consideration it deserves. Each of the issues has been fully discussed and ably considered by Judge Graves in the dissenting opinion, and we feel that the conclusions he has reached are unanswerable. In fact, were it not from certain expressions in the opinion of Judge Graves it would not have occurred to us that the majority intended to hold that the right to sue the initial carrier for the negligence of its connections existed prior to the passage of the Carmack Amendment, or that your Honors intended to hold that the Carmack Amendment undertook to reserve to the shipper any substantive rights afforded by the state law respecting damage to interstate freight. If the majority have so held, this opinion is in direct conflict with the following authoritative decisions, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

In view of the importance of this question, the fact that the important underlying issues have not been discussed in the majority opinion, and the further fact that the two new members of the Court did not hear the oral arguments, we respectfully and sincerely urge the granting of this motion for a rehearing in order that we may attempt to clear up some of the confusion that appears to exist.

Respectfully submitted, Jas. F. Green, H. H. Larimore, Thos. T. Railey, Attorneys for Relator.

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[fol. 76] And thereafter, on the 28th day of April, 1923, the following further proceedings were had and entered of record in said cause, to-wit:

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

In Banc

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING

Now at this day, on consideration of the motion for a rehearing herein, heretofore filed by the said relator, it is ordered by the Court that said motion be, and the same is hereby, overruled.

[fol. 77] IN THE SUPREME COURT OF MISSOURI

And thereafter, on the 23rd day of May, 1923, *Hon.* A. M. Woodson, Chief Justice, made an order allowing a writ of error in said cause, which said order is in the words and figures following, to-wit:

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Writ of error allowed in the above-entitled cause, upon the execution of a bond on behalf of petitioner in the sum of one thousand dollars, said bond when approved to act as a supersedeas herein.

Dated this 23rd day of May, 1923.

A. M. Woodson, Chief Justice, Supreme Court of Missouri.

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[fols. 78 & 79] Copy

IN THE SUPREME COURT OF MISSOURI, APRIL TERM, 1923

En Banc

[Title omitted]

BOND ON WRIT OF ERROR [for $1,000; approved, Woodson, J.; omitted in printing]

Endorsed on cover: File No. 29,686. Missouri Supreme Court Term No. 376. State of Missouri ex rel. The St. Louis, Brownsville and Mexico Railway Company, plaintiff in error, vs. Wilson A. Taylor, judge of the Circuit Court of the City of St. Louis. Filed June 18th, 1923. File No. 29,686.

# INDEX.

IN THE

# SUPREME COURT OF THE UNITED STATES.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,
Petitioner,

vs.

AMERICAN FRUIT GROWERS, INC., and WILSON A. TAYLOR, Judge,
Respondents.

## PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioner, The St. Louis, Brownsville and Mexico Railway Company, presents this, its petition, and prays that a writ of certiorari may be granted directing the Supreme Court of the State of Missouri to

certify to this Honorable Court for its review and determination the case of State of Missouri at the relation and to the use of The St. Louis, Brownsville and Mexico Railway Company, as relator, v. Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, No. 23,417 of said Missouri Supreme Court, and for reasons for this application petitioner respectfully shows to this Court that the American Fruit Growers, Inc., is a corporation existing under and by virtue of the laws of some state other than the State of Missouri; that heretofore, to wit, about the 13th day of June, 1921, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in a certain cause, No. 46,156, in which American Fruit Growers, Inc., was plaintiff and the St. Louis, Brownsville and Mexico Railway Company was defendant, in which said cause on or about the last-named date there was also filed an affidavit wherein it was set out that The St. Louis, Brownsville and Mexico Railway Company was a nonresident of the State of Missouri, and also on or about December 2, 1921, an alias writ of attachment was issued in said cause, whereby on the date last mentioned the Illinois Central Railroad Company was summoned as garnishee and whatever goods, chattels, moneys, effects, rights, credits, choses in action and evidences of debt in the possession of said Illinois Central Rail-

road Company, garnishee, and belonging to The St. Louis, Brownsville and Mexico Railway Company were attached by the Sheriff of the said City of St. Louis, by virtue of the alias writ of attachment hereinbefore mentioned.

That The St. Louis, Brownsville and Mexico Railway Company, defendant in said suit No. 46,156, was at all times a common carrier of freight and passengers for hire over its own line and lines of other carriers, known as connecting carriers, between points on its own lines and points on the lines of such connecting carriers in all of the states within the United States, and was at all such times engaged in interstate commerce and the transportation of freight and passengers from one state into another state of the United States.

That the damages prayed for in the petition filed in said case No. 46,156 grow out of certain shipments of freight originating on the line of The St. Louis, Brownsville and Mexico Railway Company in the State of Texas and destined to Pittsburgh, Pennsylvania, Cleveland, Ohio, and St. Louis, Missouri, respectively, and each of said shipments, in order to reach its final destination, moved over other lines of railroad than the line of railroad of The St. Louis, Brownsville and Mexico Railway Company, and through other states than the State of Texas, and said

shipments in moving to their final destinations moved over the lines of railroad hereinbefore referred to as connecting carriers.

Your petitioner says, further, that The St. Louis, Brownsville and Mexico Railway Company, as required by law, issued what is known as a through bill of lading, covering each shipment hereinbefore referred to, by virtue of the provisions of which said shipment was to be transported by means of the initial carrier and connecting carriers from points of origin to final destinations;

That at the time The St. Louis, Brownsville and Mexico Railway Company, as initial carrier, undertook the transportation of the shipments mentioned in the petition in said case No. 46,156, there was in force and effect an Act of congress, approved January 29, 1906, Chap. 3591, Par. 7, 34 Statutes at Large 584, known as the Carmack Amendment to the Interstate Commerce Act, by which it was provided:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and

no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Further, your petitioner says that it is not alleged in the petition filed in said case No. 46,156 whether the alleged damage to the shipments therein referred to occurred on the line of the initial carrier or lines of connecting carriers over which said shipments moved in order to reach final destination.

Further, your petitioner shows to the Court that in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, there has been no service of process on the defendant therein, The St. Louis, Brownsville and Mexico Railway Company, and said defendant has not entered its appearance in said cause nor filed any pleadings therein, but that the plaintiff in said cause, without the service of process on the defendant therein and without the appearance of defendant in said cause, is attempting by virtue of the provisions of the laws and statutes of the State of Missouri, and by a proceeding in attachment under and by virtue of the laws of said State of Missouri, to subject the money and property of the defendant in said cause to the satisfaction and payment of said

alleged cause of action set forth in the petition therein, and by means of a garnishment issued in aid of such attachment to subject whatever moneys that may be owing by the Illinois Central Railroad Company to the defendant in said cause to the satisfaction of said alleged cause of action.

Also your petitioner alleges that by virtue of the remedy given against the initial carrier by the terms of the Act of Congress above referred to, suit cannot be maintained in the jurisdiction of State in which personal service of process cannot be had upon said initial carrier, unless it is alleged in the petition that the loss or damage on account of which suit is brought occurred while the shipments were in the actual possession of said initial carrier, and that the right of attachment given by the statutes of the State of Missouri against nonresidents has no application, such attachments not being allowed as a federal remedy unless personal service is had upon the nonresident defendant.

Your petitioner also avers that inasmuch as the shipments mentioned in the petition filed in the Circuit Court of said City of St. Louis are interstate shipments, the liability of the defendant in that action as an initial carrier is measured by the laws of the United States and remedies provided by the different acts of Congress applicable thereto, and not

by the laws of the State of Missouri or by any statute enacted by or in force in said state.

Therefore, it is shown to this Court by your petitioner that inasmuch as the shipments set out in the petition in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, are interstate in character; that said shipments, in order to reach final destinations, moved through different states and over other lines of railroad than operated by the St. Louis, Brownsville & Mexico Railway Company; that no personal service of process has been had upon the defendant in said suit No. 46,156; that the defendant in said last-named suit has neither entered its appearance nor filed any pleading therein; that it is not alleged in the petition in said case No. 46,156 that the loss or damage on account of which this suit is brought occurred while said shipments, or any of them, were in the actual possession of the defendant in said suit; that whatever remedy the plaintiff in said suit No. 46,156 may have is a federal remedy only, and that the provisions of the statutes of the State of Missouri in the matter of attachments against nonresidents of said state are not open to plaintiff in said suit No. 46,156 as a federal remedy, the Circuit Court of the City of St. Louis, Missouri, had no jurisdiction either of the subject of the action or the person of the defendant in said suit No. 46,156.

That to permit the Honorable Wilson A. Taylor to attempt to exercise jurisdiction in said cause would, in view of the matters and things hereinbefore alleged, be a denial to petitioner of the equal protection of the laws and would be the taking of the property of your petitioner without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner avers that in order to prevent said Wilson A. Taylor, as Judge, from further exercising jurisdiction in said cause of the American Fruit Growers, Inc., v. said Railway Company, your petitioner, defendant in said cause, about the 30th day of September, 1922, applied to the Supreme Court of the State of Missouri by petition for an alternative writ of prohibition against said Taylor, as Judge, to prohibit him from making further orders in said cause pending before him; that a preliminary rule in prohibition was issued by the Supreme Court of Missouri, and that said Taylor, as Judge, filed his return thereto, and that thereafter, on the 2nd day of November, 1922, the issues in said cause in the Supreme Court of Missouri were duly submitted to the Court for its consideration and decision.

Petitioner further states that on the 2nd day of April, 1923, said Supreme Court of Missouri entered its decision in said cause wherein it ordered and directed that the preliminary rule in prohibition

theretofore issued be discharged, and that the writ of prohibition prayed for be denied, and said Supreme Court filed in said cause its opinion in which a majority of the Court found, that although The St. Louis, Brownsville & Mexico Railway Company was a nonresident corporation doing no business in Missouri and having no agent in said state on whom personal service could be had, that the petition of said American Fruit Growers, Inc., against said Railway Company stated a cause of action for loss and damage based upon the Carmack Amendment to the Interstate Commerce Act and that, as stated, suit was begun by attaching interline freight accounts due to said St. Louis, Brownsville & Mexico Railway Company; that the right to institute such a suit by attachment and without personal service on the nonresident defendant involved no substantial or substantive right, but was purely a matter of procedure; said Supreme Court further held that even if said action did not affect the substantive rights, that the shipper had such right before the Carmack Amendment to the Interstate Commerce Law, and that under the statutes of Missouri such rights were preserved to the shipper by the following provision in the Carmack Amendment:

> "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

One of the judges of the Supreme Court prepared and filed a dissenting opinion in said cause and thereafter, on the 10th day of April, 1923, and within the time required by the rules of said court, your petitioner through the State as relator filed its motion for rehearing in said cause and its suggestions in support thereof, and it contended in its said motion for rehearing, as it had theretofore contended in its application for prohibition, filed in said Supreme Court, that Congress through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, had assumed jurisdiction over the subject matter relating to loss and damage to interstate freight and had thereby, in so far as substantive matters were concerned, superseded the state statutes and the state common law which in any manner attempted to prescribe, regulate or affect the liability of carriers for damage to interstate freight, either with respect to actions against the initial carrier or to actions against the carrier on whose line the damage actually occurred.

Petitioner says that the decision of the Supreme Court of Missouri was in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States, delegating to Congress the power to regulate commerce between the several states, and that the decision of the Missouri Supreme Court in permitting the plaintiff in the cause in the Circuit

Court, City of St. Louis, to resort to the aid of state statutes, thereby adding to and supplementing the substantive rights afforded by the federal laws, contravened the rule announced by the Supreme Court of the United States in the cases of

Ry. Co. v. Varnville, 237 U. S. 604;
Ry. Co. v. Winfield, 244 U. S. 153.

Also, that the Supreme Court of Missouri, in treating as a mere matter of procedure the attachment of the property of a nonresident defendant without personal service upon it in a suit based upon the Carmack Amendment to the Interstate Commerce Act, ignored and directly contravened the principles announced in the cases of

Pryor v. Williams, 254 U. S. 43, and
White v. Ry. Co., 238 U. S. 511.

Your petitioner further states that thereafter, on the 28th day of April, 1923, relator's motion for rehearing was overruled.

Your petitioner states that the Supreme Court of Missouri is the final appellate court in said state in which the matters submitted for decision in said cause against said Taylor, Judge, could be considered and determined.

Your petitioner avers that the decision and judgment of the Supreme Court of Missouri is not only in conflict with the decisions of this Court hereinbefore cited, but that it is also opposed to and in conflict with the rule announced by this Court in the case of **Davis, Director General, v. Farmers Co-Operative Equity Company**, in error to the Supreme Court of the State of Minnesota, decided May 21, 1923.

Petitioner attaches to this application a certified copy of the proceedings had in the Supreme Court of the State of Missouri in said cause of State ex rel. The St. Louis, Brownsville and Mexico Railway Company v. Wilson A. Taylor, Judge.

Wherefore, in view of the premises, your petitioner prays that this Honorable Court will grant its writ of certiorari directed to the Supreme Court of Missouri, requiring that the complete record in said cause in said court and its judgment therein, together with the motion for rehearing and the ruling of said Court thereon, be certified to this court and that this Honorable Court will thereupon proceed to correct the errors complained of and reverse the judgment of the Supreme Court of Missouri and give to your petitioner such other and further relief as the nature

of the case may require and to the Court may seem proper in the premises.

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,

Petitioner.

By JAMES F. GREEN,

Its Attorney.

M. U. HAYDEN,

THOS. T. RAILEY,

Of Counsel.

State of Missouri, } ss.
City of St. Louis. }

James F. Green, being duly sworn, says that he is one of the attorneys of the above-named petitioner, The St. Louis, Brownsville and Mexico Railway Company, and that he has knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings had in the above-entitled cause, and that he verily believes that the facts as stated in said petition are true.

James F. Green.

Subscribed and sworn to before me, this 6th day of July, 1923.

Geo. W. Collins,
Notary Public, City of St. Louis,
Missouri.

My commission expires June 28, 1925.

United States of America,
State of Missouri. } ss.

Be It Remembered that heretofore, to wit, on the 30th day of September, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause between State of Missouri, at the relation and to the use of The St. Louis, Brownsville & Mexico Railway Company, relator, and Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, respondent, No. 23,417, the transcript of the record in said cause, which said transcript of record is in the words and figures following, to wit (caption and signatures omitted):

# TRANSCRIPT OF RECORD.

Relator filed its application for a writ of prohibition against respondent, who is one of the Judges of the Circuit Court of the City of St. Louis. This application (caption and signatures omitted) is as follows:

## APPLICATION FOR WRIT OF PROHIBITION.

Your petitioner presents to this Court its application for a writ of prohibition against respondent, who is Judge of the Circuit Court of the City of St. Louis, Missouri, presiding in Division No. 1 of that court, and for its cause of action states that it is a railway corporation duly organized and existing under and by virtue of the laws of another state than the State of Missouri; is a nonresident of the State of Missouri; has its principal place of business within

the State of Texas, and only operates a line of railroad in said State of Texas;

That the American Fruit Growers, Inc., is a corporation existing under and by virtue of the laws of some state other than the State of Missouri and maintains an office for the transaction of business in said City of St. Louis;

That heretofore, to wit, on or about the 13th day of June, 1921, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in a certain cause No. 46,156, in which American Fruit Growers, Inc., was plaintiff and The St. Louis, Brownsville & Mexico Railway Company was defendant, in which said cause on or about the last-named date there was also filed an affidavit wherein it was set out that The St. Louis, Brownsville & Mexico Railway Company was a nonresident of the State of Missouri, and also on or about December 2nd, 1921, an alias writ of attachment was issued in said cause, whereby on the date last mentioned the Illinois Central Railroad Company was summoned as garnishee and whatever goods, chattels, moneys, effects, rights, credits, choses in action and evidences of debt in the possession of said Illinois Central Railroad Company, garnishee, and belonging to The St. Louis, Brownsville & Mexico Railway Company were attached by the Sheriff of the said City of St. Louis by virtue of the alias writ of attachment hereinbefore mentioned.

That The St. Louis, Brownsville & Mexico Railway Company, defendant in said suit No. 46,156, was at all times a common carrier of freight and passengers for hire over its own line and lines of other carriers known as connecting carriers between points on

its own lines and points on the lines of such connecting carriers in all of the states within the United States, and was at all such times engaged in interstate commerce and the transportation of freight and passengers from one state into another state of the United States;

That the damages prayed for in the petition filed in said case No. 46,156 grow out of certain shipments of freight originating on the line of The St. Louis, Brownsville & Mexico Railway Company in the State of Texas and destined to Pittsburgh, Pennsylvania, Cleveland, Ohio, and St. Louis, Missouri, respectively, and each of said shipments, in order to reach its final destination, moved over other lines of railroad than the line of railroad of The St. Louis, Brownsville & Mexico Railway Company and through other states than the State of Texas, and said shipments in moving to their final destination moved over the lines of railroad hereinbefore referred to as connecting carriers.

Your petitioner says, further, that The St. Louis, Brownsville & Mexico Railway Company, as required by law, issued what is known as a through bill of lading, covering each shipment hereinbefore referred to, by virtue of the provisions of which said shipment was to be transported by means of the initial carrier and connecting carriers from points of origin to final destinations;

That at the time The St. Louis, Brownsville & Mexico Railway Company, as initial carrier, undertook the transportation of the shipments mentioned in the petition in said case No. 46,156, there was in force and effect an Act of Congress, approved January 29th, 1906, Chap. 3591, par. 7, 34 Stat. at

Large 584, known as the Carmack Amendment to the Interstate Commerce Act, by which it was provided:

> "That any common carrier railroad, or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Further, your petitioner says that it is not alleged in the petition filed in said case No. 46,156, where the alleged damage to the shipments therein referred to occurred on the line of the initial carrier or lines of connecting carriers over which said shipments moved in order to reach final destination.

Further, your petitioner shows to the Court that in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, there has been no service of process on the defendant therein, The St. Louis, Brownsville & Mexico Railway Company, and said defendant has not entered its appearance in said cause nor filed any pleadings therein, but that the plaintiff in said cause, without the service of process on the

defendant therein and without the appearance of the defendant in said cause, is attempting by virtue of the provisions of the laws and statutes of the State of Missouri, and by a proceeding in attachment under and by virtue of the laws of said State of Missouri, to subject the money and property of the defendant in said cause to the satisfaction and payment of said alleged cause of action set forth in the petition therein, and by means of a garnishment issued in aid of such attachment to subject whatever moneys that may be owing by the Illinois Central Railroad Company to the defendant in said cause to the satisfaction of said alleged cause of action.

Also, your petitioner alleges that by virtue of the remedy given against the initial carrier by the terms of the act of Congress above referred to, suit cannot be maintained in the jurisdiction of state in which personal service of process cannot be had upon said initial carrier, unless it is alleged in the petition that the loss or damage on account of which suit is brought occurred while the shipments were in the actual possession of said initial carrier, and that the right of attachment given by the statutes of the State of Missouri against nonresidents has no application, such attachments not being allowed as a federal remedy unless personal service is had upon the nonresident defendant.

Your petitioner also avers that inasmuch as the shipments mentioned in the petition filed in the Circuit Court of said City of St. Louis are interstate shipments, the liability of the defendant in that action as an initial carrier is measured by the laws of the United States and remedies provided by the different acts of Congress applicable thereto, and not by

the laws of the State of Missouri or by any statute enacted by or in force in said state.

Therefore, it is shown to this Court by your petitioner that inasmuch as the shipments set out in the petition in said case No. 46,156, pending in the Circuit Court of said City of St. Louis, are interstate in character; that said shipments, in order to reach final destinations, moved through different states and over other lines of railroad than operated by The St. Louis, Brownsville & Mexico Railway Company; that no personal service of process has been had upon the defendant in said suit No. 46,156; that the defendant in said last-named suit has neither entered its appearance nor filed any pleading therein; that it is not alleged in the petition in said case No. 46,156 that the loss or damage on account of which this suit is brought occurred while said shipments, or any of them, were in the actual possession of the defendant in said suit; that whatever remedy the plaintiff in said suit No. 46,156 may have is a federal remedy only, and that the provisions of the statutes of the State of Missouri in the matter of attachments against nonresidents of said state are not open to plaintiff in said suit No. 46,156 as a federal remedy, the Circuit Court of the City of St. Louis, Missouri, had no jurisdiction either of the subject of the action or the person of the defendant in said suit No. 46,156.

The Supreme Court of Missouri, after stating that defendant is a nonresident railroad corporation doing no business in Missouri and on whom personal service was not had, that the petition states a cause of action for loss and damage based upon the Carmack Amendment to the Interstate Commerce Act, and that the suit was begun by attaching interline

accounts due to this nonresident defendant and without personal service, held (1) that the right to institute such a suit by attachment without personal service on the nonresident defendant involved no substantial or substantive rights, but was merely a matter of procedure, and (2) that even if such action does affect substantive rights, "the shipper had such right before the Carmack Amendment under the Interstate Commerce Law and the statutes of this state, and that such rights were preserved to the shipper by the provision in the Carmack Amendment 'that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'"

That to permit the Honorable Wilson A. Taylor to attempt to exercise jurisdiction in said cause would, in view of the matters and things hereinbefore alleged, be a denial to petitioner of the equal protection of the laws and would be the taking of the property of your petitioner without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner avers that it is without adequate remedy in the premises to prevent the unlawful exercise of jurisdiction by respondent in said cause other than by prohibition to be issued by this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court will issue against the respondent, Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, its writ of prohibition restraining and preventing him from hearing or taking further cognizance or action in said cause of American Fruit

Growers, Inc., v. St. Louis, Brownsville & Mexico Railway Company, No. 46,156, pending for hearing before said respondent, and that said respondent, pending the final hearing of this cause, be prohibited and restrained from taking any cognizance or action in said suit pending before him, and that upon final hearing of this cause said prohibition against respondent may be made absolute.

**EXHIBIT A.**

State of Missouri, }
City of St. Louis. } ss.

In the Circuit Court of the City of St. Louis,
State of Missouri.
October Term, 1921.

American Fruit Growers, Inc.,
Plaintiff,

vs.

The St. Louis, Brownsville & Mexico Railway Company, a corporation,
Defendant.

No. 46,156.
Div. No.——

**Petition.**

Plaintiff states that it is a corporation duly organized according to law and as such was engaged in the business of buying and selling fruits and vegetables, and in the course of its business shipped large quantities of such fruits and vegetables over the railroad lines of various railway companies, and more particularly over that of the defendant.

Plaintiff further states that the defendant is and at all times hereinafter mentioned was a railroad corporation and common carrier, organized and existing under and by virtue of the laws of the State of Texas, and was engaged, among other things, in the transportation of fruits and vegetables over its lines through the State of Texas.

Plaintiff, for its cause of action, states that on or about the 30th day of April, 1920, one George A. Arts, as consignor, in the City of La Feria, Texas, placed

in the possession of the defendant, for a valuable consideration, as a common carrier under an agreement for transportation a carload of bulk cabbage in good, sound, merchantable condition, weighing about twenty-nine thousand six hundred thirty pounds (29,630); that the said cabbage had been sold by the said consignor to the plaintiff as consignee. That the said cabbage was transported by the said defendant in Northern Pacific car 94604, with destination as Pittsburgh, Pa.

Plaintiff further states that in violation of its common-law duty as a common carrier the defendant transported the said shipment of cabbage so negligently and carelessly that the said carload of cabbage arrived at its destination at Pittsburgh, Pa., spoiled, deteriorated and decayed, so that it was useless and unmerchantable, and the plaintiff was unable to realize anything on the same in the cabbage market; that by reason of the premises the plaintiff sustained a loss in the sum of one thousand twenty-eight dollars and five cents ($1,028.05). The market value of the said cabbage in good, sound and merchantable condition on the day of its arrival at Pittsburgh, Pa., was one thousand twenty-eight dollars and five cents ($1,028.05); that by reason of the fact that the said cabbage was worthless and unmerchantable because of the violation of the said defendant of its said common-law duty, the plaintiff was deprived of the said sum of one thousand twenty-eight dollars and five cents ($1,028.05), with interest, for which sum, together with its costs, it prays judgment.

**Count II.**

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a second cause of action herein, states that on or about the 20th day of April, 1920, George A. Arts, of Mercedes, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of bulk cabbage in good, sound, merchantable condition, weighing about twenty-five thousand seven hundred fifty-six (25,756) pounds, at Mercedes, Texas. That the said car was designated as car Lehigh Valley 36016, and the said car was transported to Cleveland, Ohio, by the said defendant. That this plaintiff had purchased the said carload of cabbage and was the consignee under the said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the carelessness and negligence of the defendant, the said carload shipment of cabbage arrived at its destination at Cleveland, Ohio, in a yellow, deteriorated and decayed condition, so that a large part of it was useless and unmerchantable, thereby forcing this plaintiff to sell the said carload of cabbage for the sum of three hundred dollars ($300.00); that the market price of similar cabbage of like grade and quality in good, sound, merchantable condition on the day of the arrival of the said shipment of cabbage at Cleveland, Ohio, namely, May 8, 1920, was nine hundred four dollars sixty-one cents ($904.61). That by reason of the said violation of the defendant of its common-law duty and of its negligence and carelessness, the plain-

tiff was forced to sell the said carload of cabbage at a loss of six hundred four dollars sixty-one cents ($604.61), for which sum, together with interest and costs of this suit, the plaintiff prays judgment.

**Count III.**

Plaintiff, for another and further cause of action herein, adopts and makes part of this cause of action paragraphs one and two, as set out in count one.

Plaintiff, for a third cause of action herein, states that on or about the 21st day of January, 1921, Hodge and Howell, of Harlington, Texas, placed in the possession of the defendant, for a valuable consideration, as a common carrier, a carload shipment of carrots, beets, cabbage, lettuce and spinach, in good, sound, mechantable condition, consisting of twenty-four (24) crates of cabbage, thirty-two (32) baskets of carrots, twenty-three (23) crates of beets, seventy-one (71) hampers of lettuce, two hundred twenty (220) hampers of spinach, and eighteen (18) crates of carrots. That the said car was designated as A. R. T. 9271, for transportation to St. Louis, Missouri. That this plaintiff had purchased said car of cabbage, carrots, beets, lettuce and spinach, and was the consignee under said shipment.

Plaintiff further states that in violation of its duty as a common carrier, and because of the negligence and carelessness of the defendant, as hereinafter set out, the said carload of vegetables arrived at its destination in a spoiled, deteriorated and unmerchantable condition, and that the plaintiff was forced to sell said cabbage, carrots, beets, lettuce and spinach at a loss of three hundred thirty dollars and twenty-two

cents ($330.22). That the reasonable and fair market value of twenty-seven (27) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition would have been five dollars ($5.00) per crate, but because of its condition plaintiff was forced to sell same for seventy dollars and seventy-two cents ($70.72). That the reasonable and fair market value of thirty-three (33) baskets of carrots on the day of its arrival at St. Louis in good, sound, merchantable condition would have been nineteen dollars and twenty cents ($19.20), but because of its condition plaintiff was forced to sell same for seventeen dollars and twenty cents ($17.20). That the reasonable and fair market value of twenty-four (24) crates of cabbage on the day of its arrival at St. Louis in good, sound, merchantable condition was fifty-four dollars ($54.00), but because of its condition plaintiff was forced to sell same for forty-one dollars and ninety-two cents ($41.92). That the reasonable and fair market value of seventy-one (71) hampers of lettuce on the day of its arrival at St. Louis in good, sound, merchantable condition was one hundred eighteen dollars and ninety-two cents ($118.92), but because of its condition plaintiff was forced to sell same for sixty-four dollars and eighty cents ($64.80). That the reasonable and fair market value of two hundred twenty (220) hampers of spinach on the day of its arrival at St. Louis in good, sound, merchantable condition was two hundred nine dollars ($209.00), but because of its condition plaintiff was forced to sell same for fifty-five dollars thirty-one cents ($55.31). That the reasonable and fair market value of sixty-six (66) baskets of beets

on the day of its arrival in good, sound, merchantable condition was eighty-two dollars and fifty cents ($82.50), but because of its condition plaintiff was forced to sell same for sixty-two dollars ($62.00).

Wherefore, by reason of all the above, plaintiff prays judgment in the sum of three hundred thirty dollars twenty-two cents ($330.22), together with interest and cost of this suit.

The total amount prayed for in the above three counts is one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,962.88).

**EXHIBIT B.**

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court of the City of St. Louis, State of Missouri. October Term, 1921.

American Fruit Growers, Inc.,
Plaintiff,

vs.

The St. Louis, Brownsville & Mexico Railway Company, a corporation,
Defendant.

No. ——
Div. ——

**Affidavit for Attachment.**

J. W. Willen, agent and attorney in fact for American Fruit Growers, Inc., of legal age, being duly sworn, states that he is the agent and attorney in fact for American Fruit Growers, Inc., that the said American Fruit Growers, Inc., has a just demand and claim against the within named defendant, the St. Louis, Brownsville & Mexico Railway Company, a corporation, as set forth in the above petition, and that the amount which the said deponent believes the plaintiff ought to recover after allowing all just credits and set-offs is the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents ($1,962.88), with interest thereon; that the said defendant is a foreign corporation and not a resident of the State of Missouri, and the said defendant cannot be served in this state in the manner prescribed in the Revised Statutes of Missouri 1919, but that the said defendant is a corporation whose chief office

or place of business is out of the State of Missouri, to wit, in the State of Texas.

(Signed) J. W. Willen.

Sworn to and subscribed before me this 11th day of June, 1921.

My commission expires February 25, 1923.

(Seal) (Signed) Lillie A. Wolf,
Notary Public, City of St. Louis, Mo.

A true copy.
Attest:
(Seal)
Nat Goldstein, Clerk.

## EXHIBIT C.

**Sheriff Directed to Attach Railway Company's Property.**

City of St. Louis.

The State of Missouri, to the Sheriff of the City of St. Louis, Greeting:

We again command you to attach The St. Louis, Brownsville & Mexico Railway Company, a corporation, by all and singular its lands, (Seal) tenements, goods, chattels, rights, moneys, credits, evidences of debt and effects, or so much thereof as shall be sufficient to satisfy the plaintiff's claim as sworn to, to wit, the sum of one thousand nine hundred sixty-two dollars and eighty-eight cents, with interest and costs of suit, in whose hands or possession soever the same may be found in your bailiwick, and that you summon the said The St. Louis, Brownsville & Mexico Railway Company a corporation, to appear at the next term of the Circuit Court before the Judges thereof, on the first day of said term, to be holden at the City of St. Louis, on the first Monday of February next, then and there to answer the action of the plaintiff, American Fruit Growers, Inc., as set forth in the annexed petition, and also that you summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of the defendant may be, or who may be named by the plaintiff or its attorney as garnishees, and particularly .....,

that they be and appear before the Judges of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them, and have you then and there this alias writ.

Witness, Nat Goldstein, clerk of our said court, with the seal thereof hereunto affixed, at office in City of St. Louis, this 2nd day of December, in the year of our Lord nineteen hundred and twenty-one.

(Seal) Nat Goldstein, Clerk.

## EXHIBIT D.

### Sheriff's Return.

No goods, chattels or real estate found in the City of St. Louis, Mo., belonging tō the within named defendant, St. Louis, Brownsville & Mexico Railway Co., a corporation, whereon to levy the writ hereto attached and make the debts and costs, or any part thereof; thereupon, by order of the attorney for plaintiff, I executed said writ, in said City of St. Louis, at the hour of 8 o'clock and 40 minutes, a. m., on the 3rd day of December, 1922, by declaring in writing to Illinois Central Railroad Company, a corporation, by delivering said written declaration, directed to said corporation to M. J. Mulconnery, chief clerk of said corporation, he being in the business office of said corporation and having charge thereof, that I attached in its hands all debts due from it to said defendant.., and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt, of, belonging to, the said defendant.., or so much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and by summoning it in writing as garnishee, and I, at the same time, by said direction, further executed said writ by summoning said corporation as garnishee, by declaring to it in writing, by delivering a summons of garnishment in writing directed to said corporation, to said M. J. Mulconnery, chief clerk thereof, that I summoned it to appear before the Circuit Court for the City of St. Louis, at the courthouse in said city, at the return term of said writ, to wit, on the first

Monday of February next, to answer such interrogatories as might be exhibited and propounded to it by the within named plaintiff.

The president or other chief officer of said corporation could not be found in the City of St. Louis at the time of service.

Chas. E. Mohrstadt,
Sheriff of the City of St. Louis,
By Joe Goldsmith,
Deputy.

Gar. & N. B. $1.50 due.
St. Louis, Mo., 2-6-1922.

**CERTIFICATE OF CLERK OF CIRCUIT COURT.**

State of Missouri, } ss.
City of St. Louis. }

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the city and state aforesaid, certify the foregoing to be a full, true and complete copy of the petition filed June 13th, 1921, in the cause wherein American Fruit Growers, Inc., is plaintiff, and the St. Louis, Brownsville & Mexico Railroad Company, a corporation, is defendant, being cause No. 14,065, Series "B," of the causes of this court, together with the affidavit for attachment filed with said petition, the alias writ of attachment, and the Sheriff's return thereon, as fully as the same remain on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the City of St. Louis, this 21st day of February, 1922.

Nat Goldstein,
Clerk, Circuit Court.

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After consideration, this Court, on the 11th day of March, 1922, issued its preliminary rule in prohibition in usual and proper form, prohibiting respondent from proceeding further in said cause, No. 46,156, until the further order of this Court.

To this rule respondent made return, which return (caption and signatures omitted) is as follows:

**RETURN ON SUGGESTION OF PROHIBITION TO THE SUPREME COURT DIRECTED AGAINST WILSON A. TAYLOR, JUDGE OF THE CIRCUIT COURT, CITY OF ST. LOUIS, MISSOURI.**

Now comes Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, Missouri, and making return to the writ of prohibition herein, shows unto the Court that, in the matter concerning which he has been cited to appear, he was proceeding in the proper exercise of his jurisdiction in such matters, conferred upon him by law, and that there is no reason in law why the rule heretofore made upon him to show cause should be made absolute.

The respondent further states that the petition filed by the relator does not state facts sufficient to constitute a cause of action in prohibition in that it shows on its face:

First. That the original petition filed in the cause below was an ordinary suit setting out that the defendant negligently transported a shipment of cabbage so that it arrived at its destination spoiled, deteriorated and decayed, and that the plaintiff was damaged thereby.

Second. That there is nothing in the petition of the plaintiff below which sets out that this suit is brought under the Carmack Act.

Third. That there is nothing in the Carmack Act which prohibits the bringing of suits of attachment.

Fourth. That the Carmack Act expressly provides that nothing in the section of the act "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Wherefore, having fully answered herewith, respondent prays that the temporary order of prohibition be dissolved and that respondent herein be ordered to further proceed with the said cause, and that this respondent be discharged hence with his costs.

---

Relator thereupon filed its motion for a judgment on the pleadings, which motion (omitting caption and signatures) is as follows:

**MOTION FOR JUDGMENT ON THE PLEADINGS.**

Comes now relator and states to the Court that in the return filed herein by respondent there is no statement controverting the allegations of fact set forth and pleaded in the application of relator for prohibition filed herein, and said return states no facts authorizing the Court to quash the preliminary rule in prohibition issued in said cause.

Wherefore, relator prays for judgment on the pleadings and that the preliminary rule issued herein may be made absolute.

And thereafter, on the 2nd day of November, 1922, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, in Banc.
October Term, 1922.

State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company,
Relator,
vs.
Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis,
Respondent.
No. 23,417.

Comes now the said parties, by attorneys, and after argument herein, submit this cause to the Court, and upon motion, the Court doth grant leave to the said relator to file a reply brief herein within five days from and after the date hereof.

And thereafter, on the 2nd day of April, 1923, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, in Banc.
October Term, 1922.

State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company,
Relator,
vs.
Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis,
Respondent.
} Prohibition.

Now, at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficientiy advised of and concerning the premises, doth consider and adjudge that the preliminary rule in prohibition heretofore issued herein be discharged, and that the writ of prohibition prayed for herein be denied, and that the said respondent recover against the said relator his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in the words and figures following, to wit:

In the Supreme Court of Missouri, en Banc.
October Term, 1922.

State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company,
Relator,
vs.
Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis,
Respondent.
} No. 23,417.

This is an original proceeding in this court whereby, upon petition of relator, we issued our preliminary rule in prohibition against respondent as Judge of Division 1 of the Circuit Court of the City of St. Louis, commanding him to appear and show cause why he should not be prohibited from hearing or taking further cognizance of or action in a certain cause pending in Division 1 of said Circuit Court, wherein American Fruit Growers, Inc. (hereinafter referred to as plaintiff), is plaintiff, and relator in this case is defendant.

The return of respondent is in effect a demurrer to the petition upon which our preliminary rule issued. It raises no issue of fact, but asks that the preliminary rule be discharged because the petition does not state facts sufficient to constitute a cause of action in prohibition. Relator filed its motion for judgment on the pleadings.

The contention of relator is that the plaintiff in the case pending in the said Circuit Court is seeking

to hold relator liable in damages as the initial carrier in certain interstate shipments under the Carmack Amendment to the Interstate Commerce Act for loss sustained by plaintiff on certain carload shipments made from points in the State of Texas to points outside said state over the lines of relator and connecting carriers. Relator has no line of railroad outside of Texas and has no office in Missouri and no agent in this state through whom personal service upon it can be obtained. Attachment was issued and the Illinois Central Railroad Company was summoned as garnishee.

Relator contends that the plaintiff under its petition is seeking to hold it liable for damages caused by the negligence of its connecting carriers; that plaintiff's right to proceed for such negligence is a right conferred by the Carmack Amendment and is a federal right and can only be enforced by means of remedies granted by the federal law; that under the federal rule such suits can only be maintained in the district wherein personal service can be had upon relator and that attachment cannot be maintained unless such personal service can also be obtained; that the same rule applies in the state courts in cases brought under the Carmack Amendment as obtains under the federal rule.

On the other hand, respondent contends that the petition states a cause of action for damages against relator only upon its common-law liability as a common carrier for its own negligence, and does not predicate relator's liability upon its liability as the initial carrier under the Carmack Amendment; that even if said petition does seek so to hold relator,

there is nothing in the amendment depriving state courts of the procedural right to attach the property of the carrier found within the jurisdiction of the state court, without regard to whether or not personal service can be had upon such carrier.

It therefore becomes necessary to examine the petition filed in the Circuit Court to determine the nature of the suit. Such petition is in three counts. The first count alleges that on April 30, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by one George A. Arts from La Feria, Texas, to Pittsburgh, Pennsylvania, over the railroad line of relator and was purchased by the plaintiff and it became consignee thereof, and that in violation of its common-law duty as a common carrier relator so negligently and carelessly transported said carload of cabbage that it was spoiled, deteriorated and decayed so that it was useless and unmerchantable and a total loss upon its arrival at destination. Judgment is prayed for the market value of such cabbage.

The second count alleges that on April 20, 1920, a carload of bulk cabbage in good, sound, merchantable condition was consigned by George A. Arts over relator's railroad line from Mercedes, Texas, to Cleveland, Ohio, and was sold to plaintiff, who became consignee thereof, and, in violation of its common-law duty as a common carrier and through relator's carelessness and negligence, said carload of cabbage arrived at destination in a yellow, deteriorated and decayed condition, so that a large part thereof was useless and unmerchantable, causing loss to plaintiff, for which it prays judgment.

The third count alleges that on January 21, 1921, Hodge & Howell, at Harlington, Texas, consigned over relator's railroad a carload shipment of vegetables, consisting of carrots, beets, cabbage, lettuce and spinach, in good, sound, merchantable condition, to St. Louis, Missouri, and that plaintiff purchased said carload of vegetables and became consignee thereof; that in violation of relator's common-law duty as a common carrier and through its carelessness and negligence said carload of vegetables arrived at destination in a spoiled, deteriorated and unmerchantable condition; and that plaintiff was forced to sell same at a loss, for which it prays judgment. The total damage sought to be recovered in the three counts is $1,962.88.

That portion of the amendment to the Act to Regulate Commerce, known as the Carmack Amendment, which is involved here, is found in Chapter 3591 of the United States Statutes at Large, Vol. 34, part 1, at page 595. It reads as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive

any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

It is obvious that the foregoing provisions did not change the liability of any carrier for its own negligence in handling shipments over its own lines (Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S., l. c. 326), but required the receiving or initial carrier to issue a bill of lading to destination, whether such shipment was wholly over its own lines or over its own lines and those of connecting carriers, and enabled the shipper or holder of such bill of lading to look to such receiving carrier for recovery for loss, damages or injury to such shipment, whether caused by such receiving carrier or any connecting carrier moving it en route to destination. It simply makes the connecting carriers agents of the receiving carrier and makes it answerable for their negligence or acts causing loss, damage or injury, with the right in the receiving carrier to recover from the carrier at fault for any loss paid under such bill of lading. The evident purpose of such amendment was to do away with the necessity of the holder of a bill of lading making an investigation to determine which carrier was at fault, if other than the receiving carrier moved the ship-

ment, and to leave the question of ultimate liability to be settled among themselves by the interested carriers.

I.

Does the petition state a cause of action under the Carmack Amendment? We think it does. Relator has no railroad line outside the State of Texas and since it accepted the shipments for destinations outside the State of Texas, part of the haul was over lines of connecting carriers, although such fact is not specifically alleged in plaintiff's petition. The three counts of the petition in the case pending before respondent are substantially alike in respect to the character of the shipments. They were consigned over the railroad of relator from different stations in Texas to destinations outside of Texas. Take the first count as characteristic of all. It does not allege that relator issued a receipt or bill of lading to destination, but does allege that the shipper placed the shipment in the possession of relator and the same was transported by it in a certain specified car with destination Pittsburgh, Pennsylvania. This is equivalent to an allegation that relator issued a through bill of lading to said destination. Relator received the shipment for transportation from a point within one state to a point within another state. In such case the carrier is required by the amendment to issue a through bill of lading and the presumption will be indulged that relator did what the law required it to do. Relator could not have limited its liability to loss, damage or injury occurring upon its own lines if it had attempted to contract to that effect when it undertook to transport the shipment

over its own and connecting lines (Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, l. c. 205).

There is nothing in the allegation that "in violation of its common-law duty as a common carrier the defendant transported the said shipment so negligently and carelessly" that said shipment arrived at destination spoiled, etc., which confines the plaintiff to proof of negligence of relator upon its own railroad line. There is no allegation that the negligence occurred while the shipment was on the line of relator. For anything appearing in the petition, the damage may have been caused while the shipment was on the line of a connecting carrier outside of Texas. Absent allegations to the contrary, the statement that loss or damage occurred to a shipment moving over two or more connecting railroads, the petition should be construed as charging that the loss or damage was caused by the delivering carrier, since the presumption is that such loss occurred on the lines of such delivering carrier, unless the contrary is alleged or proven (Chicago & N. W. Ry. Co. v. C. C. Whitmack Produce Co., 42 Sup. Ct. Rep. 328; Charleston & Car. R. R. v. Varnville, 237 U. S. 597, l. c. 602).

Nor is the situation changed by the fact that the petition alleges the loss was occasioned by carelessness and negligence and in violation of the common-law duty of relator as a common carrier. Such negligence is clearly within the Carmack Amendment. It does not change the common-law duty of the carrier. Plaintiff need not have alleged that the loss was due to negligence. All that was necessary was to allege the delivery of the shipment to relator in good, sound condition and its delivery at destination in bad condition. The carrier is liable under the common law

for all loss or damage not caused by the act of God or the public enemy, unless due to the inherent nature or quality of the shipment or the fault of the shipper or owner (10 C. J. 110). With the foregoing exceptions the carrier is answerable in damages for loss incurred en route, including its own negligence. The Carmack Amendment makes the acts of connecting carriers the acts of the receiving carrier and their negligence its negligence so far as the shipper or owner is concerned. Our conclusion is that the petition sufficiently alleged facts which, if proven, would compel relator to respond in damages for loss occurring upon the lines of its connecting carriers, as well as upon its own line, and that the petition, absent definite allegation that the damage occurred on relator's line of railroad, states a cause of action under the Carmack Amendment.

II.

It must next be determined whether plaintiff can proceed against relator under such amendment in the courts of this state by attachment when personal service cannot be had upon it here. Relator contends for the application of the federal rule, that attachment can only be maintained where the Court has jurisdiction over the person of the defendant (Big Vein Coal Co. v. Read, 229 U. S. 31; Laborde v. Ubarri, 214 U. S. 173; Ex parte Railway Company, 103 U. S. 794; Toland v. Sprague, 12 Peters 300, l. c. 329).

On the other hand, respondent contends that suit may be maintained by attachment in the state court under the Carmack Amendment, regardless of juris-

diction of the Court over the person of a defendant in the same manner as in an ordinary action; that the shipper had such right before the Carmack Amendment under the Interstate Commerce Law and the statutes of this state and that such rights were preserved to the shipper by the provision in the Carmack Amendment "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." Relator contends this provision preserves only the remedy or right of action under existing federal law.

In Adams Express Company v. Croninger, 226 U. S. 503, Mr. Justice Lurton said:

> "To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

In Lysaght v. Lehigh Valley R. Co., 254 Fed. 351, Hand, Judge, said:

> "The phrase 'existing law' means existing common law as understood in the federal courts, and excludes changes effected by state statutes."

In Southern Express Co. v. Byers, 240 U. S. 612, Mr. Justice McReynolds said:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the federal courts."

See, also, Southern Ry. v. Prescot, 240 U. S. 632, l. c. 639; N. Y. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34-38; Charleston & Car. R. R. v. Varnville Co., 237 U. S. 597-603.

The quotation above made from Mr. Justice Lurton in the Croninger case illustrates the character of rights and remedies preserved by the proviso. Under the pre-existing federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton, the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against

any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state courts also, well and good. The proviso did not take it away.

It is the expressed public policy of the Federal Government not only not to restrict the jurisdiction of the state courts in the enforcement of the provisions of the Interstate Commerce Act, but on the contrary, to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved (36 Stats. at Large, pp. 1901 and 1902, Sec. 24, Par. 8th). The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.00.

Again, it is provided in the Federal Employers' Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the federal courts.

Relator insists that because Congress has not given the federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack Amendment gives the holder of a bill of lading a right to proceed in the state

court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that:

> "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which said suit was commenced."

The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the federal courts have jurisdiction to try cases upon removal from the state courts where goods are attached and defendant has not been personally served when the same Court does not have original jurisdiction to do so. There is nothing in the Carmack amendment indicating a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used.

The precise question appears to be new so far as either the federal or state appellate courts are concerned. Two cases are cited by relator bearing squarely upon the question. Both cases were decided by trial courts. There is before us an unofficial copy of an opinion written by United States District Judge Page Morris, in the case of Pratt v. D. & R. G. W. R. Co., and C. St. P. M. & O. R. Co. et al., garnishees (said by counsel for relator to be reported in 284 Fed. 1007). The above opinion is based upon an opinion written by Judge Crump, presiding Judge in the Law and Equity Court at Richmond, Virginia, in a case entitled Neale v. Illinois Central, decided December 28, 1921, and so far as we are aware, not anywhere officially reported. The facts in both cases are quite similar to those in the case before us, and our concurrence in the conclusions therein reached would dispose of this case adversely to the jurisdiction of the respondent. The cases are in nowise controlling upon us and are only persuasive authority, in so far as we conclude they are well reasoned. Since Judge Morris rested his conclusion upon the reasoning of Judge Crump, the opinion of the latter is the one to be chiefly considered. The reasons controlling the conclusion reached by Judge Crump appear in the following quotation from his opinion as quoted by Judge Morris:

> "It seems to me that those prominent features of the federal law show plainly that a proceeding in foreign attachment under the statutes of Virginia, cannot give the right to the Court to pass upon the liability of the initial carrier, unless it is brought before the Court by

proper process or voluntarily appears. The principal defendant in such a proceeding would be deprived of the right to rebut the presumption against it, although the loss or damage occurred on the line of a connecting carrier, and the ascertainment of the amount of the plaintiff's claim, as a preliminary to subjecting the foreign defendant's property to its payment, would not be a judgment upon which the initial carrier could recover against the connecting carrier. It is now well settled that the cause of action arising under the Interstate Commerce Act may be enforced by the appropriate remedy in a state court, but it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

The heart of the argument is that "it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carrier, upon whom the statute places the burden of making defense for all the carriers concerned."

Numerous illustrations could be given where the same reasons might be urged as to the right of a plaintiff to proceed against a defendant, not personally served, where no possible doubt can exist about such plaintiff's right so to proceed. For example, A, residing in Missouri, holds a note endorsed to him by B, a resident of Texas, who received the note from C, the original payee. A, having been defeated in a suit against D, the purported maker of

the note, on the ground that the note was a frogery, finds property belonging to B in Missouri, files suit against him here and attaches such property. Would anyone contend that B is entitled to personal service and a personal judgment against him because he in turn must recoup his loss from C, the purported payee?

Again, A is in B's employ in Texas and is injured in that state by B's negligence. C has written an employer's liability policy indemnifying B against loss by reason of any judgment obtained against him by his employes. After the injury C disclaims liability on the policy. A moves to Missouri and there finding property belonging to B, files suit for damages and attaches such property. Must the suit abate because B was not personally served and must look to a suit on the policy against C to recoup his loss?

Under both illustrations the plaintiff would be entitled to maintain the suit in this state and attach any property of the defendant found therein, regardless of personal service. Yet such seems to be the most decisive consideration in Judge Crump's reasoning. He does not base his ruling upon any language in the Carmack Amendment which can be fairly construed as denying the right of attachment in the state court against the unserved nonresident initial carrier. He bases it upon the creation of a new liability under the act requiring the initial carrier to respond for loss or damage caused by a succeeding carrier and giving the initial carrier the right to recover against the carrier at fault. Yet, the liability thus created by the act is not essentially different, except in the manner of its creation, from the liability

arising under the illustrations we have used. One is created by an act of Congress, the other by contract out of which such liability grows. The substantive rights of the initial carrier are not violated to any greater extent than are those of any defendant whose property is attached under comparable circumstances. Attachment affects the remedy. It is procedural in character, a means for enforcement of a right. The rights or liabilities growing out of a contract or inherent in it or created by a statute are not enlarged or diminished by the suing out of an attachment. As said by Mr. Justice Matthews in Pritchard v. Norton, 106 U. S., l. c. 129:

> "Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

We find ourselves unable to yield our concurrence in the conclusion reached by the learned Virginia Judge, or the learned United States District Judge who adopted his opinion. Congress has encouraged the use of the state jurisdiction in cases arising under the Interstate Commerce Act. It even gives effect to attachments in cases after removal, where such attachment could not have been maintained originally in the federal courts. Our own statutes authorize the very character of proceeding we are here asked to prohibit. There is no language in the Carmack

Amendment which specifically denies the state courts the right to proceed as respondent has proceeded. It seems a strained and unnatural construction to put upon the amendment as it is written to hold that it denies the plaintiff the benefit of attachment without personal service upon the defendant. In the absence of an authoritative expression from the federal appellate courts, we will not adopt a construction which tends to impair the efficiency of procedure authorized by our own statutes and designed to facilitate enforcement of lawful demands of the citizens of this state against residents of other states who have property here.

We hold that respondent is acting within his appropriate jurisdiction and order the preliminary rule discharged.

David E. Blair, J.

All concur except Graves, J., who dissents in separate opinion.

In the Supreme Court of Missouri, en Banc,
October Term, 1922.

State of Missouri, at the Relation and to the Use of the St. Louis, Brownsville & Mexico Railway Company,
Relator,
vs.
Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis,
Respondent.
No. 23,417.

## DISSENTING OPINION.

I do not concur in the views of my learned brother writing the majority opinion in this case. I agree to the doctrine announced by the Virginia Court and the Federal Court, cited and discussed in the opinion. These cases rule, and they are the only cases upon the exact point involved here, that jurisdiction cannot be acquired as to a defendant not residing within the territorial jurisdiction of the Court, by a foreign attachment, in cases arising under what is familiarly known as the Carmack Amendment. Applying the doctrine of these cases, our preliminary rule in prohibition should be made absolute.

I.

This is purely an action created by federal law. This law for the first time created an absolute liability against the initial carrier. The petition in this case does not aver where the damage occurred, but it does aver that the freight was delivered in good

condition to the initial carrier and was damaged when delivered by the connecting carrier. There is no allegation that the damages occurred on relator's line. In this situation the presumption is that the property remained in good condition until the last moment when it could be harmed (Railway Co. v. Varnville Co., 237 U. S. 602). The action is clearly one based upon the Carmack Amendment, and is, therefore, a right of action arising under the laws of the United States (Wells Fargo & Co. v. Cuneo, 241 Fed., l. c. 727; Alabama Great Southern Ry. Co. v. American Cotton Oil Co., 229 Fed. 11).

This statute not only gives the shipper an absolute right of action against the initial carrier, but it gives the initial carrier a right of action over against the particular carrier which permitted the damages to be done. If a federal statute creates a right of action, and suit is brought to enforce such right, such suit arises under the law creating the right (McCoon v. Ry. Co., 204 Fed. 198; Alabama Great Southern Ry. C. v. American Cotton Oil Co., 229 Fed. 11).

II.

Like actions under the Federal Employers' Liability Act, suits under Carmack's Amendment can be brought in state courts, and if for less than $3,000.00 cannot be removed therefrom to a federal court. Removal is prohibited by statute (U. S. Compiled Statutes 1918, Sec. 1010). This, however, does not change the fact that the suit is one under a federal law. Prior to the statute (Carmack's Amendment) it is true that there was a right of action against a railroad for damages to goods which were transported by the rail-

road. But the peculiar right of action given by this statute did not exist. We mean the absolute right to sue for, and recover against the initial carrier, the damages sustained, although the damages did not result from any personal act of the initial carrier. Under the federal rule jurisdiction in federal courts could not be secured by a mere attachment proceeding. The defendant had to be within the territorial jurisdiction of the court, and personal service upon the defendant is required. There must be jurisdiction over the person of the defendant before attachment can be maintained under the federal rule (Big Vein Coal Co. v. Read, 229 U. S. 31; Laborde v. Ubarri, 214 U. S. 173; Ex Parte Railway Co., 103 U. S. 796).

Had the suit involved here been brought in the federal court in St. Louis, rather than the state court, as it was brought, it is clear that such federal court could acquire no jurisdiction under the cases, supra. Has the state court, in actions based upon a federal law, more power than a federal court in the same district? This is the interesting query.

III.

We are not inclined to think that we should rule (as the majority of opinion does rule) that the state court can obtain jurisdiction in a case of the character involved here, when the federal court in the same city could not acquire such jurisdiction. The majority opinion says that the action is one stated under the Carmack Amendment, as we have stated above, but says that the state court could acquire jurisdiction per force of the proviso contained in the

Carmack Amendment, which reads: "Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It is reasoned that under previous or pre-existing federal law, suit could be maintained against the connecting carrier for damages occasioned by it, and the amendment did not take away this right. We need not discuss this ruling by the majority, because no such case is involved here. The suit here is against an initial carrier, and for damages which under the pleadings and inferences to be drawn from the language were occasioned by the last connecting carrier. This right to sue the initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment. Upon this peculiar right there was no pre-existing law, and this is the right sought to be enforced in the case involved in our proceeding.

The foregoing may be somewhat adrift from what we think is the vital question here. Can a state court acquire jurisdiction in method not tolerated by the federal courts? It has been said that the Carmack Amendment not only creates a right, but furnishes a remedy (Ry. Co. v. Wallace, 223 U. S., l. c. 491). But be this as it may, we must answer the question, Does the statute allow the acquisition of jurisdiction in one way by a state court, which way cannot be used by a federal court? The proviso to the statute speaks of rights preserved, but it has been ruled that "existing laws" as used in the statute "means existing common law as understood in the federal courts, and excludes changes effected by state statutes" (Lysaght

v. Ry. Co., 254 Fed., l. c. 353). Under no existing law could federal courts acquire jurisdiction of the cause by mere attachment, without personal service. If this be the meaning of "existing law" in this statute, then the right to obtain jurisdiction of the cause and of defendant in the method used was not a right given by "existing law." The "existing law" denied this method of acquiring jurisdiction. The cases as to attachment without personal service we have cited, supra. One other view, and we are through. Of that next.

IV.

The right to sue out an attachment is a substantive right and is not mere procedure. Especially is this true when attachment is used to obtain jurisdiction. In Butler v. Young, 1 Flippin, l. c. 279, it is said:

> "Care and caution will be used that substantive rights given by the state laws shall not be confounded with what is mere practice in the state courts. In this connection I may mention, among other matters, the right to bring an absent or nonresident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the state, and, in my opinion, were not contemplated by Congress by the law in question to be given to parties in this court."

The foregoing was quoted with approval in Harland v. United Lines Tel. Co., 40 Fed., l. c. 317. The force of it is that the acquisition of jurisdiction is substantive law, and not mere procedure. If it be

substantive law, then in cases arising under a federal law the rule of the federal courts must govern. Wherever substantive rights are involved in such cases the federal rule must prevail. If the acquisition of jurisdiction is not a substantive right, it would be hard to find one. It has been ruled that "the question of burden of proof is a matter of substance and not subject to control by the laws of the several states" (Ry. Co. v. Harris, 247 U. S. 367; Baker et al. v. Schaff, 211 S. W., l. c. 104, and the cases therein cited). So, too, the federal rule as to what constitutes assumption of risk in personal injury cases is substantive law, to which the state courts must bow (Pryor v. Williams, 254 U. S. 43, and cases therein cited).

So if the acquisition of jurisdiction by attachment is substantive law, and in view of the rulings, supra, we think it is, then the statutes or rules of the state do not control, but the federal rule must be applied by the state court. If jurisdiction by foreign attachment is denied by federal rule, then it must be denied by the state trying a case arising under a federal law, notwithstanding the state rule or state statute may be different. By the federal rule an attachment is merely an incident to the suit and personal service must be obtained. If the state court undertakes to try a case arising under a federal law, it must follow the federal rule in matters of substantive law. The state court is attempting to proceed without jurisdiction and our preliminary rule should be made absolute.

W. W. Graves, J.

And thereafter, on the 10th day of April, 1923, the said relator filed its motion for rehearing in said cause and suggestions in support thereof, which said motion and suggestions are in the words and figures following, to wit (caption omitted):

## RELATOR'S MOTION FOR REHEARING.

Comes now relator and, within the time required by the rules of this Court, files this motion for rehearing in the above-entitled cause for the reason that questions decisive of the case and duly submitted by counsel have been overlooked by the Court, as hereinafter more particularly stated, to wit:

1.

That Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, and has thereby, in so far as substantive matters are concerned, superseded the state statutes and the state common law which in any manner attempt to prescribe, regulate or affect the liability for damage to interstate freight, either with respect to actions against the initial carrier or to actions against the carrier on whose line the damage actually occurred; that while the Carmack Amendment does specifically preserve to the shipper "any remedy or right of action which he has under existing law," yet under the authoritative rulings of the Supreme Court of the United States, this provision preserves to the shipper only the statutory and common-law rights existing under the federal law, and does not

preserve to him rights that he previously had under the common law and statutes of the states; that this plaintiff, suing in a state court, upon a cause of action based upon the federal statute, is bound by the substantive limitations and the substantive rights that would be afforded the defendant had the suit been filed in the federal courts, and that the attachment of a nonresident defendant's property without personal service upon him in a suit based upon a federal statute or the common law of the federal courts, and under circumstances which would not be permissible were the suit filed in a federal jurisdiction, affects and prejudices the substantive rights of the defendant and deprives him of his property without due process of law, and abridges the privileges and the munities of a citizen of the United States in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2.

That the issue in this case, according to the majority opinion, is whether the shipper had a right prior to the enactment of the Carmack Amendment, under the Interstate Commerce Law and the statutes of this state, to sue the initial carrier for damage which is presumed to have occurred upon the line of its connections, and whether such a right, if it existed, was preserved to the shipper by the provision of the Carmack Amendment to the effect "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law"; that while the Court has not directly indicated its ruling upon

this specific issue, its ultimate conclusion and Judge Graves' interpretation of the majority opinion in his dissenting opinion indicate that this Court intended to hold that prior to the Carmack Amendment "the Interstate Commerce Law or the statutes of this state" authorized suit against the initial carrier for damage occurring upon the line of its connections, and that such rights, if any, both federal and state, were preserved to the shipper by the specific provisions of the Carmack Amendment; that there was, as a matter of fact, no right, prior to the enactment of the Carmack Amendment, under the federal statutes or the federal common law, authorizing a shipper to sue the initial carrier for the negligence of its connections, much less to begin such a suit by attachment, and that if this Court intends to permit plaintiff to predicate his cause of action upon the statutory or substantive common law of this state, or intends to permit him to piece out his federal right of action by resorting to the statutes or common law of the state with respect to matters other than mere procedure, then this opinion is in direct conflict with the authoritative decisions of the federal courts in the following cases, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

3.

That the decision of this Court is in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States delegating to Congress the power to regulate commerce between the several

states, in this, to wit: That Congress, through the Carmack Amendment, has taken jurisdiction over all matters relating to loss and damage of interstate freight, thereby superseding all state laws and regulations with respect thereto, and that this Court, in permitting plaintiff to resort to state statutes, hereby adding to and supplementing the substantive rights afforded by the federal statute, has directly contravened the rule announced in the following authoritative decisions, to wit: Ry. Co. v. Varnville, 237 U. S. 604; Ry. Co. v. Winfield, 244 U. S. 153, and Prigg v. Pennsylvania, 16 Pet. 617.

4.

That this Court, in terming and treating as a mere matter of procedure the attachment of the property of a nonresident defendant, without personal service upon him in a suit based upon the Carmack Amendment to the Interstate Commerce Act, is ignoring and directly contravening the principles announced in the following authoritative decisions, to wit: Pryor v. Williams, 254 U. S. 43; Ry. Co. v. White, 238 U. S. 511; Ry. Co. v. Gray, 241 U. S. 338; Ry. Co. v. Harris, 247 U. S. 371; Slater v. Ry. Co., 194 U. S. 126; Harland v. Telephone Co., 40 Fed. 311, and Pratt v. D. & R. G. W. R. R. Co., 284 Fed. 1007.

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**Suggestions in Support of Motion for Rehearing.**

The correct determination of the question at issue involves several underlying issues and principles. **First**, has not Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, assumed jurisdiction over all claims for loss and damage to interstate freight, so that the common law and the statutes of the states are no longer applicable? **Second**, does the specific reservation in the Carmack Amendment to the effect that nothing in said section shall deprive a shipper of "any remedy or right of action which he has under existing law" preserve to him merely the rights that he had under the federal common law, or does it preserve to him rights that he previously had under the common law and statutes of the states? **Third**, where a plaintiff sues in a state court upon a transitory cause of action based upon a federal statute or upon the common law of the federal courts, is he not bound by all of the substantive rights that the defendant would be entitled to in the federal courts? **Fourth**, does not the bringing in of a nonresident defendant by attachment affect the substantive rights of the defendant, or is it a mere matter of practice and procedure which does not add to the substantive rights of the plaintiff, nor deprive defendant of substantial rights accorded him by the federal law?

We have, with some disappointment, failed to find any of these important underlying principles and issues either discussed or directly answered in the majority opinion in this case. Lest, in our previous briefs, we may not have made our views clear to all of the Court, we will tersely restate them.

Congress, through the Interstate Commerce Act, and particularly through the Carmack Amendment, assumed jurisdiction over all loss and damage to interstate freight. Any previously existing rights with respect to interstate shipments based on state statutes or upon the state common law completely vanished upon the enactment of said statute. The act itself preserved to the shipper his previously existing rights under the federal common law, but not his previously existing rights under the state common law. There is, of course, a marked distinction in many respects between the federal common law and the state common law, respecting, for example, the burden of proof, the assumption of risk, etc. A plaintiff in a state court has a right to predicate his cause of action upon the federal statute or upon the federal common law, but in doing so he must take the federal law as he finds it. He can use the machinery of the state—the state courts with their local rules of pleading and procedure—to enforce his federal rights, but he cannot resort to the statutes of the state or the common law of the state to obtain additional substantive rights or to deprive defendant of substantial rights which he would be entitled to were the suit prosecuted in the federal courts. He can enforce the federal law in the state courts just as he can enforce in one state a transitory action based upon a statute of another state, but he must take federal rights of action as he finds them, with the disadvantages as well as the advantages that would attach in the federal courts. It follows, therefore, that if the bringing in of a nonresident defendant by attachment involves a substantial or substan-

tive right, as distinguished from mere procedure, defendant's property is being taken without due process of law.

With this brief statement of our contention in mind, we respectfully request that the Court carefully analyze the second proposition discussed in the majority opinion. Judge Blair, speaking for the Court, says:

> "Respondent contends * * * that the shipper had such right before the Carmack Amendment under the Interstate Commerce Law and the statutes of this state, and that such rights were preserved to the shipper by the provision in the Carmack Amendment 'that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' Relator contends this provision preserves only the remedy or right of action under existing federal law."

The issue thus stated, we gather from the majority opinion, is the underlying point in dispute, and yet we have read and reread the majority opinion without being able to determine whether the Court has passed upon this question, much less how it has decided it. Does this Court intend to hold that the Carmack Amendment preserves to the shipper of interstate freight substantive rights that previously existed under either the state common law or the state statutes? To so hold would be in direct conflict with the three leading cases from which the Court quotes.

We assume from the fact that the writ is dismissed that Judge Blair intends to so hold that the Carmack

Amendment does not deprive shippers of substantial rights based upon the common law of the state, but we very much doubt that the other learned Judges who concurred in this opinion realize that they were agreeing to such a conclusion, if such is the case. We respectfully urge that this doubt should be cleared up, and that if it is the intention of this Court to decide this issue in what we deem direct conflict with the federal decisions referred to, then we respectfully insist that this ruling should be in positive and unequivocal language. On the other hand, if it was not the intention to hold that the Carmack Amendment still preserves to the shipper substantial rights based upon the statutes and common law of the states, we are at a loss to understand on what ground the Court has found for respondent.

Furthermore, as emphasized by Judge Graves in his dissenting opinion, what such existing right did the shippers, at the time of the passage of the Carmack Amendment, have? A cause of action predicated upon the Carmack Amendment—and the majority opinion concedes that this is a suit based on the Carmack Amendment—is a statutory cause of action which did not exist at common law and which consequently did not exist at the time of the passage of the Carmack Amendment. To quote from the dissenting opinion:

> "The suit here is against an initial carrier, and for damages which under the pleadings, and inferences to be drawn from the language, were occasioned by the last connecting carrier. This right to sue the initial carrier for the damages which were occasioned by the connecting carrier was first given by the Carmack Amendment.

Upon this peculiar right there was no pre-existing law, and this is the right sought to be enforced in the case involved in our proceeding."

The majority opinion, after stating the aforesaid issue and citing cases on which this respondent is relying, without drawing its conclusions therefrom, then proceeds:

"Under the pre-existing federal law the holder of a bill of lading could sue a connecting carrier for loss, damage or injury caused by its own fault and this right was not taken away by the amendment. The same right could have been enforced in the state court. The right to proceed in the state courts was recognized by and was a part of the existing federal law. It is unlikely Congress intended to deprive the state court of the power to enforce rights previously recognized and enforceable in both jurisdictions. If it had so intended, it is reasonable to assume it would have so declared in the amendment in unequivocal language. It would appear that its silence amounts to sanction of jurisdiction of state courts previously exercised. Referring to the illustration of Mr. Justice Lurton the most reasonable construction to be given to the proviso is that it did not limit the holder of a bill of lading to suit against initial carrier if he was able to show a right to recover directly against any succeeding carrier upon whom fault for such loss could be fastened, especially as the connecting carrier may have been more conveniently proceeded against. If such right was previously enforceable in the state courts also, well and good. The proviso did not take it away.

"It is the expressed public policy of the Federal Government not only not to restrict the juris-

diction of the state courts in the enforcement of the provisions of the Interstate Commerce Act, but, on the contrary, to encourage resort to the jurisdiction of the state courts. For example, such policy is shown by the amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved (36 Stats. at Large, pp. 1901 and 1902, Sec. 24, par. 8th). The amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.

"Again, it is provided in the Federal Employers' Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662) not only that the state courts have concurrent jurisdiction with the federal courts in enforcing the provisions of the act, but that when an action is brought thereunder in the state courts of competent jurisdiction, such case is not removable to the federal courts."

This Court argues, supra, that the right to proceed in the state court was recognized by the federal law; it argues that Congress did not intend to deprive the state courts of their power to enforce such rights; it argues that had Congress so intended to deprive the state courts of jurisdiction, it would have expressly so provided; it argues that "it is the expressed public policy of the Federal Government not only to restrict the jurisdiction of the state courts in the enforcement of the provisions of the Interstate Commerce Act but, on the contrary, to encourage resort to the jurisdiction of the state courts"; and it cites as an example the provisions of the Em-

ployers' Liability Act specifically authorizing suits thereon in the state courts.

We fully concur in all that the Court has to say, but what bearing does it have on this case? We are not disputing the right of this shipper to sue in the state courts on a federal transitory right of action, but what we are insisting is that if he elects to sue in the state court upon a federal right of action, he must take that right of action subject to all of the restrictions with respect to substantive matters that would be binding upon him if his suit were filed in the federal courts. For example, if a shipper sues in the courts of Missouri upon a cause of action created by the statutes of Kansas, he acquires that right subject to the limitations and interpretations that the Supreme Court of Kansas has placed upon it. If the Supreme Court of Kansas has held that it must be enforced in some particular manner, he cannot resort to the Missouri decision and to the Missouri statutes in support of his right to enforce it in this state in some other manner, if to do so would prejudice substantial rights that the defendant would have were the suit filed in the State of Kansas. The same rule is applicable where a shipper sues in the state courts on a federal right of action—he acquires that right of action subject to the restrictions with which it is surrounded by the policy and rulings of the federal courts. He cannot piece out the federal right of action by relying upon the public policy and the common-law decisions of the forum. At no time have we questioned the right of this plaintiff to sue in the state courts, and yet the majority opinion treats this as one of the principal issues in the case.

The majority opinion proceeds:

"Relator insists that because Congress has not given the federal courts jurisdiction by attachment, except in districts where the defendant may be personally served, the Carmack Amendment gives the holder of a bill of lading a right to proceed in the state court only where personal service may be had upon the defendant. Congress has clearly recognized the validity of attachments in state courts in removal cases when it provided (34 Stats. at Large, p. 1098, Sec. 36, Chap. 231) that 'When any suit shall be removed from a state court to a District Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which said suit was commenced.'

"The section quoted from makes no exceptions. If Congress did not intend to recognize the provisions of state laws authorizing attachment of the property of the defendant found within its jurisdiction, regardless of summons upon the defendant, it would have provided that, upon removal to the federal court of cases where the defendant could not be personally served, the attachment should be dissolved. The result is that the federal courts have jurisdiction to try cases upon removal from the state courts where goods are attached and defendant has not been personally served when the State court does not have original jurisdiction to do so. There is nothing in the Carmack Amendment indicating

a different policy in the enforcement of its provisions. It should be so construed only when a construction denying complete state jurisdiction clearly appears from the language used."

We fail to appreciate the Court's analogy between the removal statute referred to and the point at issue in this case. The removal statute simply provides that where there has been valid and lawful service in the state court, even though begun in a manner which would not be recognized in an initial proceeding in the federal court, it shall be good upon removal to the federal court. Instead of this rule being against us, it is, as a matter of fact, directly in line with what we are contending. Service by attachment is more than a mere matter of procedure—it is a substantial or substantive right. It was not the intention of Congress that removal to the federal court should deprive plaintiff of such substantial rights afforded him by the courts in which his suit was properly brought. If his service by attachment was valid in the state court, it was the intention of Congress that this substantial right be protected upon removal to the federal court. It was not the intention of Congress, however, to authorize suit in the state court on a federal right of action to be begun by the attachment of a nonresident defendant's property, while at the same time prohibiting such right in the federal courts. All that the statute in question did was to protect the substantive rights that the plaintiff was lawfully entitled to in the state courts prior to the removal, and Congress has not, either directly or impliedly, undertaken to extend the rights of such plaintiff with respect to any suit

which could not otherwise be begun by the attachment of the property of an absent defendant.

This Court might just as plausibly argue that because Congress has seen fit to authorize suits in the state courts based upon the Federal Employers' Liability Act, that it has thereby impliedly sanctioned the application of the common law and public policy of the state with respect thereto, and yet the Supreme Court of the United States, discussing this question in such cases as Ry. Co. v. White, 238 U. S. 511, and Pryor v. Williams, 254 U. S. 43, has refused to permit the state courts to apply their rules with respect to burden of proof and assumption of risk, on the ground that substantive rights are involved.

It seems to us unreasonable that this Court should ignore well-established rules and precedents on the underlying issues in this case, and attempts to reason out from entirely irrelevant legislation the presumed intention attributed to Congress. Nor are the reasons given for this presumed intention of the lawmakers well taken, for, as pointed out by Judge Graves in his dissenting opinion, "Has the state court in actions based upon the federal law more power than the federal court in the same district?" In other words, was it the intention of Congress to permit a plaintiff to avail himself in the state court, in a suit based on the federal statute, of additional substantive rights not afforded him in a suit on the same statute in the federal courts? To attribute such an intention to Congress would, in our opinion, be to consider Congress extremely inconsistent, to say the least. As a matter of fact, however, the statute referred to has nothing whatever to do with this case, either directly or by analogy.

The remaining portion of the majority opinion is devoted to a discussion of the decision of Judge Page Morris in Pratt v. D. & R. G. W. R. R., 284 Fed. 1007, and to the unreported opinion of Judge Crump, presiding Judge in the Law and Equity Court at Richmond, Virginia, in Neale v. Illinois Central. This Court rather disparagingly refers to Judge Morris' decision as "an unofficial copy of an opinion," notwithstanding the fact that it then proceeds to give reference to the volume and page of the Federal Reporter where the case is reported, and as a matter of fact, the case was printed in the Federal Advance Sheets of February 15th, and was in the bound volumes of the Federal Reporter at the time this opinion was handed down. We assume that Judge Crump hardly anticipated that his unreported opinion would be circulated broadcast, otherwise he would doubtless have expressed in detail the reasons leading up to his conclusions. As it stands, his opinion is largely in the nature of conclusions.

This Court, in characterizing the opinion of Judge Crump, states:

> "The heart of the argument is that 'it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carriers, upon whom the statute places the burden of making defense for all the carriers concerned.'"

We think that Judge Crump's opinion goes further than this, and that his conclusions are well taken. However, an examination of our briefs will disclose that we merely quoted the decision of Judge Crump,

and did not present the case on the reasoning advanced by him.

The same was true in the presentation of the Pratt case before Judge Morris. The Pratt case was presented on the same briefs that have been filed in the case at bar, and the opinion of Judge Crump was quoted, but not commented upon. In other words, we argued the Pratt case, and we have argued this case, upon the theory outlined in the first few paragraphs of these "suggestions in support of the motion for rehearing." While Judge Morris, in the Pratt case, did quote and adhere to the views expressed by Judge Crump, yet this Court has apparently overlooked the fact that Judge Morris likewise considered the additional arguments which we advanced before him and have urged before this Court, and in his opinion specifically held that:

> "I believe that the right to bring an absent or nonresident defendant into court by publication or personal service outside the state affects the substantive rights of the defendant. (See Harland v. Telephone Co. [C. C.], 40 Fed. 311, 6 L. R. A. 252.)"

It will be noted from this Court's statement of the gist of Judge Crump's opinion that it is entirely distinct from the principal grounds we have presented in support of relator's application. Judge Crump, according to this Court, held that such an attachment was void because it would be denying to the initial carrier and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights in the absence of the initial carrier. There is nothing in our briefs in support of this

argument other than the quotation of Judge Crump's opinion, but, on the contrary, we have stood upon the argument that the bringing in of a nonresident defendant by foreign attachment involves a substantive right not accorded the plaintiff by the common law of the federal courts, and that under the circumstances a plaintiff suing upon the federal statute in the state courts cannot avail himself of such additional substantive rights accorded by the common law of the states or by the state statutes, to the prejudice of the defendant. As stated, we think the conclusions reached by Judge Crump are correct, but even if they are not, the lengthy discussion of his opinion has no bearing upon the principal theory on which this case has been presented, briefed and argued.

This Court, in the concluding paragraph of the majority opinion, reiterates its views as to Judge Crump's decision, again refers to the federal removal statute, and to the fact that Congress has encouraged the use of the state courts, and in conclusion states that the Court will not adopt a construction which tends to impair "the efficiency of **procedure** authorized by our own statutes."

The primary point at issue has been and now is whether the bringing in of a nonresident defendant under such circumstances is a mere matter of procedure or whether it is the violation of a substantial or substantive right, and this Court, instead of passing upon this question and considering the decisions cited by us which are directly in point, and the decisions of the Supreme Court of the United States applicable by analogy, has passed this issue without comment other than to refer to it in this concluding sentence as "procedure." If the bringing in of a

nonresident defendant by attachment under such circumstances is a matter of procedure, we have frankly admitted and now admit that we have nothing further to argue. The issue is of such importance as to warrant a detailed expression of the views of this Court.

Concluding our suggestions in support of this motion for rehearing, we again respectfully insist that not a one of the several primary issues involved in this case has been discussed in the majority opinion of the Court. To reiterate, these issues are, first, whether Congress, through the Interstate Commerce Act, and particularly the Carmack Amendment thereto, has assumed jurisdiction over the subject matter relating to loss and damage to interstate freight, so as to supersede all statutes and common law of the states otherwise applicable; second, whether the specific language of the Carmack Amendment reserving to the shipper "any remedy or right of action which he has under existing law" preserves to him the rights and remedies previously existing under the statutes and common law of the state; third, whether a plaintiff suing in the state court upon a transitory action afforded by a federal statute must take his right of action subject to all substantive rights that the defendant could avail himself of in the federal jurisdiction; and fourth, whether the bringing in of a nonresident defendant by attachment is such a substantial right as to amount to more than mere procedure.

Until these primary issues have been answered by the majority, we hardly feel that the case has been given the consideration it deserves. Each of the issues has been fully discussed and ably considered by Judge Graves in the dissenting opinion, and we

feel that the conclusions he has reached are unanswerable. In fact, were it not from certain expressions in the opinion of Judge Graves it would not have occurred to us that the majority intended to hold that the right to sue the initial carrier for the negligence of its connections existed prior to the passage of the Carmack Amendment, or that your Honors intended to hold that the Carmack Amendment undertook to reserve to the shipper any substantive rights afforded by the state law respecting damage to interstate freight. If the majority have so held, this opinion is in direct conflict with the following authoritative decisions, to wit: Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 503, and Lysaght v. Lehigh Valley R. Co., 254 Fed. 351.

In view of the importance of this question, the fact that the important underlying issues have not been discussed in the majority opinion, and the further fact that the two new members of the Court did not hear the oral arguments, we respectfully and sincerely urge the granting of this motion for a rehearing in order that we may attempt to clear up some of the confusion that appears to exist.

Respectfully submitted,

JAS. F. GREEN,
H. H. LARIMORE,
THOS. T. RAILEY,
Attorneys for Relator.

And thereafter, on the 28th day of April, 1923, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, in Banc.
April Term, 1923.

State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company,
Relator,
vs.
Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis,
Respondent.
No. 23,417.

Now at this day, on consideration of the motion for a rehearing herein, heretofore filed by the said relator, it is ordered by the Court that said motion be, and the same is hereby, overruled.

State of Missouri—Set.

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause of State of Missouri, at the relation and to the use of the St. Louis, Brownsville & Mexico Railway Company, relator, v. Wilson A. Taylor, Judge of the Circuit Court of the City of St. Louis, respondent, No. 23,417, as fully as the same remain of record and on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, state aforesaid, this 8th day of June, 1923.

(L. S.)

J. D. ALLEN,
Clerk of the Supreme Court of
the State of Missouri.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,
Petitioner,

vs.

AMERICAN FRUIT GROWERS, INC., and WILSON A. TAYLOR, Judge,
Respondents.

No. 376.

## BRIEF OF PETITIONER.

## STATEMENT.

The question in this case for decision is whether service may be had by attaching the property of a nonresident defendant carrier in an action based upon the Carmack Amendment for damages presumed to have occurred upon the line of the delivering carrier. It is the contention of petitioner that since service by such attachment is not permissible in the federal courts, and the right of action is predicated upon a

federal statute, the attachment law of the state cannot be restorted to, since to do so would affect substantive rights rather than matters of mere procedure.

The American Fruit Growers, Inc., filed in the Circuit Court of St. Louis, Missouri, against the St. Louis, Brownsville & Mexico Railway Co. a purported cause of action in three counts for alleged damage to shipments of cabbage originating on the line of said railway company in the State of Texas, consigned to points on the lines of connecting carriers outside the State of Texas. The said railway company operates only in the State of Texas, and has no agent in the State of Missouri.

The only service was by attaching interline accounts due the defendant carrier by other railroads on whom service could be had in the City of St. Louis. On this service the Circuit Court attempted to assume jurisdiction, whereupon the carrier applied to the Supreme Court of Missouri for a writ of prohibition. Return was made to this writ, admitting the substantial allegations, but specifically denying that the petition in the state court was based upon the Carmack Amendment and specifically denying that the federal law prohibited the beginning of such a suit against such a nonresident defendant by attachment and without personal service.

These issues were fully briefed, argued and submitted to the Supreme Court of Missouri, which court held that the petition was based upon the Carmack Amendment, but the Court upheld the right to institute such a suit by attachment. The correctness of this latter ruling is challenged on the ground that it violates both the due-process clause and the commerce clause of the Federal Constitution. In its application for certiorari petitioner assigned as errors committed by the Supreme Court of Missouri the following:

I.

That the decision of said Supreme Court was in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States delegating to Congress the power to regulate commerce between the several states, and that, in permitting the plaintiff in the cause in the Circuit Court to resort to the aid of state statues, thereby adding to and supplementing the substantive rights afforded by the federal laws, the Court contravened the rule announced by this Court in the cases of

Ry. Co. v. Varnville, 237 U. S. 604, and
Ry. Co. v. Winfield, 244 U. S. 153.

II.

That the Supreme Court of Missouri, in treating as a mere matter of procedure the attachment of the property of a nonresident defendant, without personal service upon it in a suit based upon the Carmack Amendment to the Interstate Commerce Act, ignored and contravened the principles announced in the cases of

Pryor v. Williams, 254 U. S. 43, and
White v. Ry. Co., 238 U. S. 511.

III.

That the decision of the Supreme Court of Missouri is also in conflict with and opposed to the decision of this Court in the case of

Davis, Dir. Gen., v. Farmers Equity Co., 43 Sup. Ct. Reporter, No. 15, p. 556.

# BRIEF.

## I.

The Carmack Amendment having superseded all state laws as to proceedings for damages to interstate shipments, the right of defense by carriers sued on causes of action arising under the act is a substantive right which cannot be defeated or abridged by a state statute.

Davis v. Wechsler, Vol. 44, Sup. Ct. Rep. No. 2, p. 13 (Advance Sheets);
Davis v. Farmers Equity Co., Vol. 43, Sup. Ct. Rep. No. 15, p. 556;
White v. Ry. Co., 238 U. S. 511;
Prescott v. Ry. Co., 240 U. S. 641;
Lysaght v. R. R. Co., 254 Fed. Rep. 353;
Riverside Mills v. Ry. Co., 219 U. S. 206.

## II.

Federal laws govern as to actions against nonresident defendants under said act, and there should be no proceeding without personal service.

Varnville v. R. R., 237 U. S. 597;
Pratt v. Ry. Co., 284 Fed. Rep. 1007;
Haddock v. Haddock, 201 U. S. 562;
Davis v. Farmers Equity Co., Vol. 43, U. S. Sup. Ct. Rep. 556;
Pennoyer v. Neff, 95 U. S. 726;
Coal Co. v. Read, 229 U. S. 38;
Laborde v. Ubani, 214 U. S. 174;
Levy v. Fitzpatrick, 15 Pet. 171.

# ARGUMENT.

A transitory right of action created by a Federal statute, in the absence of limitations to the contrary, may be enforced in the state courts, but, as we shall hereafter attempt to show, the state courts, in enforcing rights based upon such Federal statutes, must respect all substantive rights that the defendant would be entitled to were the action being prosecuted in the Federal courts. Personal service, as opposed to service in transitory actions by so-called foreign attachment, is, in our opinion, a matter of substance rather than one of mere procedure, and if we are correct in this assumption, it follows that suits in the state courts based upon the Carmack Amendment or the Federal Employers' Liability Act cannot be begun in a manner contrary to the well-established policy of the Federal law. Rights based on the Carmack Amendment alone are involved in this action; hence, it is appropriate at the very outset to briefly consider the nature of this statute and of the rights which it affords.

## Nature of the Right of Action Created by the Carmack Amendment.

The Carmack Amendment to Section 20 of the Interstate Commerce Act (34 Stat. L. 584) provided:

> "That any common carrier, railroad or transportation company receiving property for trans-

portation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

The first and second Cummins Amendments and the Transportation Act have each added new provisions, but the language of the original Carmack Amendment continues substantially unchanged.

The Carmack Amendment partakes both of the nature of a right of action and a remedy. In the case

of Ry. Co. v. Riverside Mills, 219 U. S. 206, the Court, discussing this question, said:

> "The liability of the receiving carrier which results in such a case is that of a principal for the negligence of its own agents. * * * It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

In Ry. Co. v. Wallace, 223 U. S. 491, the Court, after reaching the conclusion that an action based on the Carmack Amendment was transitory, and that such a suit could be prosecuted in the state courts, said:

> "This presumption would be strengthened as to a statute like this passed, **not only for the purpose of giving a right, but affording a convenient remedy.**"

In Adams Express Co. v. Croninger, 226 U. S. 503, discussing the proviso to the effect that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, the Court (on page 507 of the opinion) said:

> "To construe this proviso as preserving to the holder of any such bill of lading any right or

> remedy which he may have had under existing federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

Discussing this same question, and citing authorities in support thereof, Judge Hand, in the case of Lysaght v. Ry. Co., 254 Fed. 353, said:

> "The phrase 'existing law' means existing common law as understood in the federal courts, and excludes changes effected by state statutes."

The Supreme Court of Missouri has very properly held that the action filed in the state court is predicated upon the Carmack Amendment rather than upon the common law. If, however, it can be contended that it is a common-law action for damages, it must be the common law of the federal courts, for it concerns an interstate shipment, and a suit based upon such a federal common-law right, like the suit based upon a federal statutory right, is acquired subject to all substantive rights that could be availed of by the defendant in the federal courts. It is immaterial, therefore, whether the action is predicated upon the Carmack Amendment or the federal common law applicable to interstate ship-

ments, as in either event, Congress having taken jurisdiction over the subject matter, the state statutes and the state common law vanish.

Again quoting from the Croninger case, supra (226 U. S. 505):

> "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading, which he must issue, and limits his power to exempt himself by any rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state legislation with reference to it."

The Carmack Amendment has, therefore, entirely superseded the statutes and common law of the state with respect to suits for damage to interstate shipments, except in so far as said state statutes and state common law afford a mere method of procedure for the purpose of enforcing the federal rights and violate no substantial right of the defendant accorded by the federal law. A plaintiff can enforce his federal rights in the state courts and can adopt the pleading and practice of the state courts in so far as this does not prejudice substantial federal rights of the defend-

ant, but with respect to matters of substance, as distinguished from matters of practice, the state law has, as it were, been entirely wiped out of existence.

**Under the Federal Rule, Attachment Cannot Be Maintained Unless the Court Has Jurisdiction Over the Person of the Defendant.**

In Big Vein Coal Co. v. Read, 229 U. S. 38, the Court, citing and following a well-established line of federal decisions, said:

> "We think the rule has not been changed: That an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a federal court."

In Laborde v. Ubarri, 214 U. S. 174, Judge Holmes, speaking for the Supreme Court, said:

> "In the courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' * * * 'Unless the suit can be maintained' means, of course, unless the Court has jurisdiction over the person of the defendant."

In the much-cited case of Ex Parte Railway Company, 103 U. S. 796, the Court said:

> "It is conceded that the person against whom this suit was brought in the Circuit Court was

an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and unless he could be sued no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

In Levy v. Fitzpatrick, 15 Pet. 171, the Court said:

"By the Eleventh Section of the Judiciary Act of 1789, it is enacted, * * * 'and no civil suit shall be brought before this Court, against an inhabitant of the United States, by an original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.' The construction given by this Court to these provisions is that no judgment can be rendered by a Circuit Court against any defendant who has not been served with process issued against his person, in the manner here pointed out, unless the defendant waive the necessity of such process by entering his appearance to the suit."

In the leading and much-cited case of Toland v. Sprague, 12 Pet. 329, et seq., the Supreme Court said:

"Nothing can be more unjust than that a person should have his rights passed upon and finally decided by a tribunal without some process being served upon him by which he will have

notice, which will enable him to appear and defend himself. This principle is strongly laid down in Buchanan v. Rucker, 9 East. 192. Now, it is not even contended that the circuit courts could proceed to judgment against a person who was domiciled without the United States and not found within the judicial district, so as to be served with process, where the party had no property within such district. We would ask what difference there is, in reason, between the cases in which he has and has not such property? In the one case, as in the other, the Court renders judgment against a person who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction and upon whom they have no power to cause process to be personally served. If there be such a difference we are unable to perceive it.

* * * * * * *

"With these views we have arrived at the same conclusions as the Circuit Court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the Circuit Court can issue no process beyond the limits of their districts. 2. That, independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of Congress adopting the state process adopt the form and modes of service only so far as the persons are rightfully within the reach of

such process, and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts. 4. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court in personam; that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add that even in case of a person being amenable to process in personam an attachment against his property cannot be issued against him except as part of or together with process to be served upon his person."

**Personal Service, as Distinguished From Service by Foreign Attachment, Is a Substantive Right Rather Than a Mere Matter of Procedure.**

A very full distinction between substantive rights and mere matters of practice and procedure is found in the case of Pritchard v. Norton, 106 U. S. 128 to 136, inclusive, and on page 129 of the opinion the Court lays down this rule:

"The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country, but whatever goes to the substance of the obligation and affects the

rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

Discussing the application of this rule to suits in the state courts based on the Federal Employers' Liability Act, the Supreme Court of the United States in Ry. Co. v. White, 238 U. S. 511, said:

"There can, of course, be no doubt of the general principle that matters respecting the remedy —such as form of action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. * * * **But matters of substance and procedure must not be confounded because they happen to have the same name.** * * * As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted, the state court can, in those and similar instances, follow their own practice, even in the trial of suits arising under the federal law. But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure."

In Ry. Co. v. Gray, 241 U. S. 338-9, the Court, reannouncing the same rule, said:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend

upon it and **applicable principles of common law as interpreted and applied in federal courts.**"

The language last above quoted is again used by the Supreme Court of the United States in Ry. Co. v. Harris, 247 U. S. 371.

In the case of Slater v. Ry. Co., 194 U. S. 126, Judge Holmes, speaking for the Supreme Court of the United States, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligations, * * * but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. * * * Therefore, we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The case of Ry. Co. v. Prescott, 240 U. S. 641, involved the application of a Texas statute which undertook to place upon the carrier the burden of proving that damage from fire occasioned while it

held the property under the liability of a warehouseman was not caused by its negligence, and in passing on this question the Court, to quote from the syllabus, held:

> "If the loss admittedly occurs by fire, the burden is upon the plaintiff to prove negligence, notwithstanding the rule may be different under state law."

Reannouncing this rule in the very recent case of American Railway Express Co. v. Levee, decided October 22, 1923, the Court said:

> "The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law."

If, in the trial of a case based on the Carmack Amendment, burden of proof is to be considered as a substantive right rather than a mere matter of procedure, how much more justification is there for holding that the right of the defendant to be personally served, rather than to be brought into court by foreign attachment, is a substantive right of which he cannot be deprived by the state courts.

In the recent case of Davis v. Farmers Co-op. Equity Co., 43 U. S. Sup. Rep. 556, decided subsequent to the opinion of the Supreme Court of Mis-

souri now under review, this Court held that the law of the state permitting service upon the soliciting agent of a nonresident railroad involved more than mere matters of practice and procedure, and affected substantial rights not only of the carrier, but of the public in general, in derogation of the commerce clause of the Constitution.

It would seem by analogy that service by attachment under substantially similar circumstances must likewise affect substantive rights, for the burden on interstate commerce is as obnoxious in the one instance as in the other.

In the still more recent case of Davis v. Wechsler, decided October 22, 1923, 44 Sup. Rep. 13, this Court, in reversing a decision of the Missouri courts wherein alleged local procedure was invoked for the purpose of obtaining service in a manner violating substantial federal rights, said:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * This is familiar as to the substantive law, and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

In the case of Harland v. Tel. Co., 40 Fed. 311, the Court, in emphasizing that such jurisdictional matters involve substantive rights, rather than mere forms of practice and procedure, cites with approval the following quotation from Butler v. Young, 1 Flip. 276:

> "Care and caution will be used that substantive rights given by the state laws shall not be confounded with what is mere practice in the state courts. In this connection I may mention, among other matters, **the right to bring an absent or nonresident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the state**, and, in my opinion, were not contemplated by Congress, by the law in question, to be given to parties in this court."

Judge Morris, in Pratt v. Ry. Co., 284 Fed. 1007, reaching the same conclusion with respect to facts identical to those in the case at bar, said:

> "I believe that the right to bring an absent or nonresident defendant into court by publication or personal service outside the state affects the substantive rights of the defendant."

It is apparent from the foregoing decisions that the initial carrier, in an action based upon the Carmack Amendment, cannot be sued in any federal court other than one in which personal service can be ob-

tained. This is the right which the federal law gives to the plaintiff, and the obligation that it imposes upon the defendant. Can it be said that the State Legislatures can go further and add to this federal right the further right that Congress has not seen fit to grant, namely, a right to sue in a jurisdiction in which defendant is not doing business? An argument in support of an analogous contention was advanced in Ry. Co. v. Varnville, 237 U. S. 597, with respect to a state statute which undertook to impose a penalty for failure to promptly settle loss and damage claims. Pointing out the illegality of this statute when applied to interstate commerce, the Court said:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The Supreme Court of the United States, in Haddock v. Haddock, 201 U. S. 562, held that the full faith and credit clause of the Constitution does not require one state to respect the judgment of another state based upon service by publication. It follows from this that personal service must be a substantive right rather than a mere matter of procedure, for certainly no court has ever held that full faith and credit should not be given to the judgment of a for-

eign state merely because of the practice and procedure in the trial of the case which led to the judgment. As to such matters of practice and procedure the judgment is conclusive, but with respect to such substantive rights as that of personal service the judgment is not conclusive.

The well-defined policy of the federal law is thus stated in the leading case of Pennoyer v. Neff, 95 U. S. 726:

> "If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

This is exactly what has happened and what will continue to happen so long as the initial carrier can be dragged into foreign jurisdictions by reason of state statutes authorizing attachment without personal service.

As a matter of fact, nothing could be more high-handed and unjust than to require some small road which has perhaps received only a few dollars revenue, to employ attorneys, transport witnesses across the country at its own expense, and appear in some distant jurisdiction to defend the rights of other carriers against claims for damage due to no fault of its own. It is enough that it be required to defend such suits in jurisdictions where it employs salaried attorneys, but when called upon to defend such suits in foreign jurisdictions, the attorney's fees and other nontaxable costs frequently exceed the amount of the claim, and there is no provision in the Carmack Amendment permitting the initial carrier, whether successful or unsuccessful in the outcome of the litigation, to collect these nontaxable costs from the connecting carriers. The injustice of such a situation is too apparent to need further argument, and not only deprives the carrier of its substantive rights to the extent of violating the due-process clause of the Constitution, but likewise places a substantial burden upon interstate commerce.

Service by foreign attachment is not permissible in the Federal Courts, and suits based on the Carmack Amendment, at least in so far as substantive rights are concerned, must be controlled by "applicable principles of common law as interpreted and applied in

Federal Courts." These rights cannot be enlarged by state statutes permitting service by attachment.

In this connection we quote the following from the dissenting opinion of Judge Graves, of the Missouri Supreme Court, in this case:

> "The right to sue out an attachment is a substantive right and is not mere procedure. Especially is this true when attachment is used to obtain jurisdiction. * * * So if the acquisition of jurisdiction by attachment is substantive law, and, in view of the rulings supra we think it is, then the statutes or rules of the state do not control, but the Federal rule must be applied by the State Courts. If jurisdiction by foreign attachment is denied by Federal rule, then it must be denied by the state trying a case arising under a Federal law, notwithstanding the state rule or state statute may be different. By the Federal rule an attachment is merely an incident to the suit and personal service must be obtained. If the State Court undertakes to try a case arising under a Federal law it must follow the Federal rule in matters of substantive law."

The observations of Justice Brandeis in the

**Farmers Co-Operative Equity Case,**

are also pertinent:

> "Orderly effective administration of justice clearly does not require that a foreign carrier

shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use (citing cases). Avoidance of waste, in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

It is respectfully submitted that the judgment of the Missouri Court should be reversed.

H. H. LARIMORE and
JAS. F. GREEN,
Attorneys for Petitioner.

T. T. RAILEY,
M. U. HAYDEN,
Of Counsel.

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**Cases Cited.**

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

STATE OF MISSOURI ex rel. THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

AMERICAN FRUIT GROWERS, INC., and WILSON A. TAYLOR, Judge of the Circuit Court of the City of St. Louis,
Respondents.

No. 376.

## BRIEF OF RESPONDENTS.

## STATEMENT.

The American Fruit Growers, Inc., is a corporation organized under the laws of the State of Delaware, but is and was at all times during this litigation licensed to do business in the State of Missouri, maintains an office in the City of St. Louis and has an agent and employes in St. Louis.

Suit was filed in St. Louis by the American Fruit Growers, Inc., against the St. Louis, Brownsville & Mexico Railway Company on account of damages to three shipments, all originating in the State of Texas, but with three (3) different destinations outside of the State of Texas, as follows:

The first count deals with a shipment from La Feria, Texas, to Pittsburgh, Pennsylvania, with the American Fruit Growers, Inc., as consignee. The second count deals with a shipment from Mercedes, Texas, to Cleveland, Ohio, to the same consignee, and the third count deals with a shipment from Harlington, Texas, to St. Louis, Missouri, also to the same consignee. Suit was brought under the State Attachment Law, and the Illinois Central Railroad was garnished. The petitioner sued out a writ of prohibition in the Supreme Court of the State of Missouri, which Court duly issued its preliminary writ, but after a hearing quashed its preliminary writ, holding that there is nothing in the Carmack Amendment which denies the right of a consignee to sue in the state court under the Carmack Amendment, although service is obtained by publication in the usual form provided for under the State Attachment Laws.

The petitioner in this case challenges the correctness of the ruling of the Supreme Court of the State of Missouri on the ground that the said ruling vio-

lates both the commerce clause and the due process law in the Federal Constitution. We shall discuss these in order.

I.

The petitioner takes the position that the ruling giving the shipper the right to bring suit by attachment is an interference with interstate commerce and contravenes the rule as laid down in Railway Co. v. Varnville, 237 U. S. 604, and Railway Company v. Winfield, 244 U. S. 153.

We shall discuss petitioner's position and point out that its authorities are wholly inapposite.

In the Varnville case South Carolina had enacted a law to the effect that the carrier, failing to pay a claim promptly in a case growing out of an interstate shipment, should pay a penalty of fifty dollars. The United States Supreme Court held that this was an interference with interstate commerce. That this case is not at all in point and that the principle enunciated in the Varnville case is not at all applicable to the case at bar is immediately obvious. In the Varnville case there was an interference with interstate commerce and there was an undue burden placed upon the same.

In the case at bar the bringing of the attachment has nothing to do with the interstate shipment, but is

merely an incident to a suit, being proceedural and affecting the remedy.

Evans-Snider-Buel Co. v. McFadden, 185 U. S. 505;

Rice et al. v. Adler-Goldman Com. Co., 71 Fed. 151;

Peoples Saving Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 1264, U. S. App. 6035, 1 Fed. 130;

Hanscom v. Malden & Melrose Gaslight Co., 220 Mass. 8.

However, as herein pointed out, this Court allowed the assessment of attorney's fees as part of the court costs in cases arising under interstate commerce laws where such fees did not exceed two hundred dollars ($200.00) (M. K. & T. R. R. v. Harris, 234 U. S. 412). This case will be adverted to hereafter.

In the Winfield case, cited by the petitioner, the United States Supreme Court merely held that the Federal Employers' Liability Act so completely covered the subject of liability of interestate carriers for death or injury to employes while engaged in interstate commerce that a state act which undertakes to cover the same subject matter is invalid. That this case is not at all applicable is well illustrated by the fact that Mr. Justice Brandeis, who wrote the opinion in the Davis, Director, case, cited by the petitioner as well as the respondent, and who recently wrote the

opinion in the case of Wells v. Atchison, Topeka & Santa Fe Railway Company, in which he expressly approves the doctrine in the Davis case in the Wells opinion, and yet denies a recovery in the Wells case, dissented in the Winfield case, holding that the mere fact that Congress has legislated upon the subject does not indicate that the states are cut off from legislation relating to the health, life and safety of their citizens, although the legislation might indirectly affect the commerce of the country, and that the legislation of a state is not necessarily inconsistent with action taken by Congress. We are not presenting this as our views, but simply to illustrate the fact that Mr. Justice Brandeis, upon whose opinions petitioner relies in its brief, did not have in mind when he wrote the opinions in the Davis and Wells cases, respectively, that all state action constitutes an interference with interstate commerce, even after Congress has legislated upon the subject matter.

## II.

It is urged by the petitioner that the Supreme Court of Missouri, in treating as a mere matter of procedure the attachment of the property of a non-resident defendant, without personal service upon it, in a suit based upon the Carmack Amendment to

the Interstate Commerce Act, ignored and contravened *the principles announced* in the cases of

Pryor v. Williams, 254 U. S. 43, and
White v. Ry. Co., 238 U. S. 511.

The Williams case merely holds that the Federal Employers' Liability Act prevails over any state law upon the same subject. There was no question of attachment or jurisdiction of the Court. The case merely decides that a state cannot pass a law which is inconsistent with the Federal Employers' Liability Act.

The case of White v. Ry. Co., 238 U. S. 51, merely announces a familiar principle of law, namely, that matters of procedure depend upon the law of the place where the suit is brought, matters of substance in regard to an action based on a federal statute depend upon the statute; this case holds that in an action under the Employers' Liability Act the burden of proof as to contributory negligence is a matter of substance and not of mere state procedure.

These cases obviously have no application to the case at bar, as they merely reiterate familiar rules of law which are not applicable to the facts in the present case. We challenge petitioner to produce a single case which holds that a suit brought in a

state court by attachment without personal service is other than procedural, even where afterwards removed to the Federal Court.

## III.

### Is Attachment Interference with Interstate Commerce?

It is contended that the decision of the Supreme Court of Missouri is in conflict with the case of Davis, Director General, v. Farmers Equity, 262 U. S. 312.

In this case the Minnesota law provided that a foreign corporation having an agent in the state for the solicitation of freight and passenger traffic or either thereof over its lines outside of the State of Minnesota could be served with summons by delivering a copy thereof to such agent. The only question before this court was whether or not this statute as construed and applied violated the Federal Constitution.

The Santa Fe Railway Company, a Kansas corporation, had no line in Minnesota, but maintained an agent there for the solicitation of business.

The Santa Fe Railway Company was sued by a Kansas corporation in Minnesota, the suit being directed against the Director General. Service was made pursuant to the Minnesota statute above cited.

The recovery sought was for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that state to another state. The transaction was in no way connected with the State of Minnesota or with the soliciting agent there.

The Court held that the Minnesota law compelled every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state; that jurisdiction was not limited by the statute to suits arising out of **business transacted within Minnesota** and that this condition imposed a heavy burden upon interstate commerce.

But this Court goes on further to say:

> **"It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them."** (Bold-face type ours.)

The Court carefully reserved the question, now raised by this record.

This Court recognizes the fact that the orderly administration of justice requires that corporations,

even though entirely engaged in interstate business, are not immune from the ordinary process of the state courts.

International Harvester Co. v. Kentucky, 234 U. S. 579.

The case of Davis, Director General, v. Farmers' Equity Company was followed by the case of Wells v. A. T. & Santa Fe Railway Company, decided by this Court May 12, 1924. This case, with which this Court is entirely familiar, is discussed hereinafter.

In the International Harvester Co. case this Court held that a corporation, although engaged in interstate business exclusively, is nevertheless subject to the ordinary procedure of attachment in the state court. This Court announced the same principle in the case of The Atchison, Topeka & Santa Fe Railway Company, petitioner, v. Edmund R. Wells et al. (decided May 12/24, opinion U. S. S. C., ad. opinions, June 1/532), by Mr. Justice Brandeis, who likewise delivered the opinion in the Davis case just referred to.

In the Wells case, Wells was a citizen and resident of Colorado and was injured in New Mexico while working for the Atchison, Topeka & Santa Fe Railway Company. Wells filed suit in Texas, but could not obtain personal service upon defendant in that state. He procured from the same Court a writ

of garnishment to a Texas railway company whose line connected with the Santa Fe. This line had in its possession Santa Fe rolling stock and also owed the Santa Fe large sums of traffic balances. Constructive service was made upon the Santa Fe by serving one of its officers at Kansas and by publication in the Texas newspapers. The Santa Fe failed to appear in the action. Judgment was rendered against it, in the sum of four thousand dollars ($4,000.00) and costs, by default. Objection was made by the garnishee to the jurisdiction, but the objection was overruled. This Court again affirmed the long-recognized principle that rolling stock held by the garnishee and used in interstate commerce and the amount due on traffic balances arising out of interstate transactions did not render the property immune from seizure by attachment or garnishment, and cited Davis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 217 U. S. 157, which appears to be the leading case upon the proposition. But the Court held that the writ of garnishment was void for the following reasons: The Santa Fe was a Kansas corporation; it had not been admitted to Texas as a foreign corporation; it had not consented to be sued there; it did not own or operate any line of railroad within the state; it had no agent there; the plaintiff, **Wells, was a citizen and resident of another state; the cause of action arose elsewhere** against a railroad cor-

poration of another state which was engaged in interstate commerce, the said railroad neither owning nor operating a railroad in Texas, and it had not consented to be sued there.

Mr. Justice Brandeis reiterated the doctrine, as laid down in the Davis case; there is nothing added which does not appear in the Farmers' Equity Company case, but the facts in these cases were different from those in the case at bar.

In the case at bar the American Fruit Growers, Inc., has **an office in the City of St. Louis, State of Missouri; is licensed to do business in Missouri; has an agent there; has employes there; does business there, and had one of the shipments consigned to St. Louis,** so that it is not a case where the jurisdiction of a foreign state court is invoked because of the fact that the law of that state may be more advantageous to the plaintiff's cause of action, which last fact undoubtedly influenced this Court in the Farmer's Equity case and in the Wells case. In the former case the Court referred to the avalanche of litigation then pending in Minnesota courts, brought by nonresidents against nonresident carriers (26 Ill. S., l. c. 317). Certainly the American Fruit Growers, Inc., had as much right to bring suit in the State of Missouri as any domestic corporation or any individual.

Sidway v. Land and Live Stock Co., 187 Mo., l. c. 673;

McCabe v. R. R., 13 Fed. 827;
Murphree Foreign Corp., sec. 247;
R. R. v. Harris, 12th Wall., p. 65;
Express Co. v. Ware, 20 Wall. 543.

We have just discussed the three alleged errors which, it is claimed in petitioner's brief, the Supreme Court of Missouri committed. Then petitioner raises two points, namely:

1. "The Carmack Amendment having superseded all state laws as to proceedings for damages to interstate shipments, the right of defense by carriers sued on causes of action arising under the act is a substantive right which cannot be defeated or abridged by a state statute."

2. The federal laws govern as to actions against nonresident defendants under said act, and there should be no proceeding without personal service. We will discuss these in order.

## I.

On the first point, six cases are cited by petitioner, but none of them hold that the right of action or the defenses are in any way affected by attachment or garnishment, and none of them hold that a suit under the Carmack Amendment can not be brought in a state court, using the state machinery of attachment and garnishment, and none of these cases hold

that constructive service in suits brought under the Carmack Amendment cannot be obtained; the question is not even discussed. Therefore we will not discuss these cases under this point. Certainly, there is nothing in the Carmack Amendment which so states, or which tends to indicate such an intention on the part of Congress. On the contrary, had Congress so intended, undoubtedly it would have so specified in the amendment. In fact, a contrary intention is deducible.

Section 22 of the Interstate Commerce Act provides in part as follows:

> "* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The proviso in Section 20, paragraph 11, of the Interstate Commerce Act is very similar to the language used in section 22, and reads as follows:

> "Provided further that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under the existing law."

This Court, in construing Section 22 of the Interstate Commerce Act, above quoted, in the oft-quoted

case of T. & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, l. c. 446-7, 51 L. Ed. 553, at 561, said:

> "This clause, however, cannot in reason be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned along with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as **cumulative** when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

In Adams Express Company v. Croninger, 226 U. S. 491, l. c. 507-8, which case is cited by petitioner, the Supreme Court, in construing the meaning of the proviso to Section 20, paragraph 11, of the Interstate Commerce Act, said:

> "What this Court said of the 22nd section of this act of 1887 in the case of Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this Court said of that contention **what must be said of the proviso in the 20th section,** that

it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, **whether given by the Interstate Commerce Act, or by state statute,** or common law, not **inconsistent** with the rules and regulations prescribed by the provisions of this act. Again it was said of the same clause, in the same case, that it could not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

It is very clear, therefore, that this Court has interpreted the proviso of section 20, paragraph 11, **so that all the rights and remedies not inconsistent with the provisions of the Interstate Commerce Act remained in force and effect after the passage of the Carmack Amendment. Attachment, being merely a statutory form of remedy as hereinafter further shown in detail, would not be inconsistent with any proviso of the Interstate Commerce Act or with any provision of the Carmack Amendment.**

This Court has gone further even than to hold that a suit by attachment is not in conflict with the Interstate Commerce Act or with the Carmack Amendment when it held in the case of M. K. & T. R. R. Co. v. Harris, 234 U. S. 412, 58 L. Ed. 1377, that a state statute allowing attorneys' fees to a successful plain-

tiff in a suit upon a claim not exceeding two hundred dollars ($200.00) for overcharges on freight or for a claim for a loss to damaged freight, did not amount to a direct burden upon interstate commerce, and was, therefore, not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with federal authority, and in the absence of any congressional legislation covering the subject. This Court specifically held that Congress has not so far exercised its paramount authority by enacting the Carmack Amendment of June 29, 1906, so as to prevent the application to a claim against the carrier, based upon a loss of an interstate shipment under the provisions of Texas Laws 1909, page 93, for the allowance of a reasonable attorney's fee against any person or corporation doing business in the state on account, among other things, of any claim for lost or damaged freight, if the claim was not paid within thirty days after demand and if recovery was for the full amount claimed.

This Court used the following language:

> "With respect to the specific effect of the Carmack Amendment, it has been held in a series of recent cases (cases cited omitted) that the special regulations and policies of particular states **upon the subject of the carriers' liability** for loss or damage to interstate shipments and

the contracts of carriers with respect thereto have been superseded.

"But the Texas statute now under consideration **does not** in anywise either **enlarge or limit** the responsibility of the carrier for the loss of property intrusted to it in transportation, and **only incidentally affects the remedy** for enforcing that responsibility. As pointed out in the Cade (421) Case, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678, it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney, applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally included claims for freight lost or damaged in interstate commerce.

"It is true that in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 183, 31 L. R. A. (n. s.) 7, 31 Sup. Ct. Rep. 164 (a case arising since the Hepburn Act), it was held that Section 8 of the Act of February 4, 1887, does not authorize the allowance of a counsel or attorney's fee in an action for loss of property intrusted to the carrier for purposes of transportation. But that is far from holding that it is not permissible for a state, **as a part of its local procedure**, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated

by the Commerce Act, the state courts have full jurisdiction, and some difference respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the forum. And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptional the policy of allowing recovery of a moderate attorney's fee as a part of the costs in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is **not inconsistent with the provisions of the Commerce Act and its amendments. The local (422) statute, as already pointed out, does not at all affect the ground of recovery or the measure of recovery**; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak the state may enforce it in such a case as the present."

If the imposition of an attorney's fee is permissible under a state statute, which was enacted after the Carmack Amendment went into effect, certainly the remedy of attachment in the state court would entail no additional burden and would remain open to the shipper.

Section 36 of the Judicial Code and the decisions and practice in the federal courts recognize and give effect to attachments in state courts.

Clark v. Wells, 203 U. S. 164.

There is nothing more inconsistent in the action of the American Fruit Growers, Inc., in bringing the suit under the Carmack Amendment, and obtaining jurisdiction by attachment under the state statute, than if it had begun suit by attachment against a connecting carrier for negligence. Such action certainly would not be inconsistent with the Interstate Commerce Act or with the Carmack Amendment. There would be the main cause of action and there would be the incidental proceeding or the attachment, and by no stretch of the imagination does the Carmack Amendment change or alter the status of the parties so far as the remedy of attachment is concerned.

Furthermore, it is obvious that the provisions of the Carmack Amendment did not change the liability of any carrier for its own negligence in handling shipments over its own lines.

Cincinnati & Texas Pacific Ry. v. Rankin, 241 U. S., l. c. 326.

The receiving, or initial carrier, however, is required to issue a bill of lading to destination whether

such shipment is wholly over its own line or over its own line and those of connecting carriers, and is intended to enable the shipper or holder of the bill of lading to look to such receiving carrier for his loss and damage, and simply makes the connecting carriers agents of the receiving carrier, making the latter answerable for the negligence of all, reserving, however, the right to the initial carrier to hold the carrier at fault for any loss paid under such bill of lading. The purpose of the amendment unquestionably was to avoid the necessity of forcing the holder of the bill of lading to make an investigation to determine which carrier was at fault. Under the previously existing federal or state law, the holder of a bill of lading could sue a connecting carrier for loss or damage caused by such connecting carrier's fault and the Carmack Amendment did not change this right. The same right could be enforced in the state court, and this is recognized by the federal courts. If Congress had intended to change this rule so as to deprive the state courts of the power to enforce rights previously recognized and enforceable in both federal and state jurisdictions, certainly, it would have so declared in the amendment in unequivocal language. On the contrary, it is the expressed public policy of the Federal Government not only not to restrict the jurisdiction of the state courts, but to encourage litigants to resort to the jurisdiction of state

courts. This is illustrated by the Amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved (36 Stats. at Large, pp. 1901 and 1902, Sec. 24, Par. 8th). The Amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.00, and so, in the Federal Employers' Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662), not only have state courts concurrent jurisdiction, but when an action is brought in a state court of common jurisdiction it is not removable to the federal courts.

## DUE PROCESS.

It is argued by petitioner that it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights unless the initial carrier is personally served, upon whom the statute places the burden of making defense for all the carriers concerned.

This argument is answered by the Supreme Court of Missouri in a simple illustration, which is very aptly put and better stated than we could have stated it. We, therefore, quote the Missouri Supreme Court as follows (298 Mo. 747, 151 S. W. 383):

> "Numerous illustrations could be given where the same reasons might be urged as to the right

of a plaintiff to proceed against a defendant, not personally served, where no possible doubt can exist about such plaintiff's right so to proceed. For example, A, residing in Missouri, holds a note endorsed to him by B, a resident of Texas, who received the note from C, the original payee. A, having been defeated in a suit against D, the purported maker of the note, on the ground that the note was a forgery, finds property belonging to B in Missouri, files suit against him here and attaches such property. Would anyone contend that B is entitled to personal service and a personal judgment against him because he in turn must recoup his loss from C, the purported payee?

"Again, A is in B's employ in Texas and is injured in that state by B's negligence. C has written an employer's liability policy indemnifying B against loss by reason of any judgment obtained against him by his employes. After the injury C disclaims liability on the policy. A moves to Missouri and, there finding property belonging to B, files suit for damages and attaches such property. Must the suit abate because B was not personally served and must look to a suit on the policy against C to recoup his loss?

"Under both illustrations the plaintiff would be entitled to maintain the suit in this state and attach any property of the defendant found therein, regardless of personal service. Yet such seems to be the most decisive consideration in Judge Crump's reasoning. He does not base his ruling upon any language in the Carmack Amendment which can be fairly construed as denying

the right of attachment in the state court against the unserved nonresident initial carrier. He bases it upon the creation of a new liability under the act requiring the initial carrier to respond for loss or damage caused by a succeeding carrier and giving the initial carrier the right to recover against the carrier at fault. Yet, the liability thus created by the act is not essentially different, except in the manner of its creation, from the liability arising under the illustrations we have used. One is created by an act of Congress, the other by contract out of which such liability grows. The substantive rights of the initial carrier are not violated to any greater extent than are those of any defendant whose property is attached under comparable circumstances. Attachment affects the remedy. It is procedural in character, a means for enforcement of a right. The rights or liabilities growing out of a contract or inherent in it or created by a statute are not enlarged or diminished by the suing out of an attachment. As said by Mr. Justice Matthews in Pritchard v. Norton, 106 U. S., l. c. 129:

"'Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters or process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract.'"

## IV.

### Personal Service in Attachment Suits.

The second point urged by petitioner in its brief on page 5 is that federal laws govern as to actions against nonresident defendants under said act and there should be no proceeding without personal service.

Petitioner cites eight cases, but none of them bear out this proposition. They are cases in which the rule is laid down that in the federal courts personal service is required before a personal judgment can be obtained against a defendant. This is true in a state court where a personal judgment is obtained; but in the federal courts, as we have indicated in this brief, personal service must also be obtained upon a defendant before an attachment lies, but this is not the rule in state courts and the federal courts have expressly recognized the rule prevailing in state courts when attachment suits have been removed from the state courts to federal courts.

> Removal Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 54);
> Clark v. Wells, 203 U. S. 164.

Petitioner argues that the Carmack Amendment partakes both of the nature of a right of action and a remedy. The cases cited by petitioner not only

fail to bear out petitioner's contention, but support the proposition of law contended for by respondents, and which proposition was sustained by the Supreme Court of the State of Missouri. For instance, in the case of Railway Co. v. Riverside Mills, 219 U. S. 206, the Court says:

> "The liability of the receiving carrier which results in such a case is that of a principal for the negligence of its own agents. * * * It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

It is thus seen that the remedy afforded is cumulative. It does not create a cause of action that never existed before, but presents remedies in addition to those theretofore prevailing, and so in the case of Adams Express Company v. Croninger, 226 U. S. 505, where the "proviso" is quoted to the effect that nothing in the Carmack Amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under existing law, the Court held that these rights or remedies exclude changes effected by state statute. It is obvious that this language refers to legislation of any state which might be contrary to

federal law and has no reference to judicial steps which are **procedural in character.** This is logical. Otherwise a state could enact legislation which would directly contravene the Carmack Amendment and the proviso would thereby be construed to destroy itself. Obviously it was not the intention of Congress to permit states, through legislation, to vary or destroy the Carmack Amendment or to have forty-eight different Carmack Amendments in the forty-eight different states.

This is the kind of impossible dissimilarity pointed out in the Abilene Cotton Oil case, supra, if each court could in the first instance determine the validity of railroad tariffs.

On page 10 of petitioner's brief it is said that the Carmack Amendment has, therefore, entirely superseded the statutes and common law of the state with respect to suits for damage to interstate shipments, except in so far as said state statutes and state common law afford a mere method of procedure for the purpose of enforcing the federal rights and violate no substantial right of the defendant accorded by the federal law. A plaintiff can enforce his federal rights in the state courts and can adopt the pleading and practice of the state courts in so far as this does not prejudice substantial federal rights of the defendant, but with respect to matters of substance, as dis-

tinguished from matters of practice, the state law has, as it were, been entirely wiped out of existence.

The trouble with petitioner's position is that the petitioner fails to distinguish between a matter of substance and a matter of procedure. Petitioner has nowhere in his brief, or elsewhere, pointed out a single case which holds that an attachment or garnishment in a state court brought as an incident to a main cause of action, is a substantive right. On the contrary, all of the cases hold that it is merely a matter of procedure and some cases even go to the extent of holding that it is a mere possessory right. Petitioner, in its brief, admits that an attachment is but an incident to a suit (Petitioner's Br., p. 11).

There is no question but that the main suit can be maintained in the state court and constructive service obtained, although it may not, under the same circumstances, be maintainable in the federal court on account of the lack of personal service. This is the distinction that has been pointed out in this brief, a distinction which the federal courts, including this Court, have recognized in innumerable cases. If the petitioner is correct in its contention, then the rule of attachment, as at present constituted, would be entirely changed and revolutionized and even wiped out, and an attachment, instead of being procedural, would become a matter of substantive law, because, if it is true in one case, there is no

reason why it shouldn't be true in all cases, and such a conclusion would do away with state attachments under all federal laws, but that such was not the intention of Congress is manifest by the removal statute (34 Statutes at Large, page 198, Section 36, Chapter 231) expressly validating state attachments.

In the case of Clark v. Wells, 203 U. S. 164, it is expressly held that an attachment begun in the state court cannot be rendered nugatory in the federal courts upon removal, because Section 4 of the Removal Act, March 3, 1887, c. 373, 24 Stat. 552 U. S. Comp. St. 1901, p. 54) prohibits this. Therefore, where property of a nonresident defendant is seized under a state statute and the case is then removed to the federal court, the lien obtained through the attachment is preserved in the federal court, although a suit under the same circumstances could not be maintained in the federal court without obtaining personal service. If attachment laws deny defendants due process of law, then Section 4 of the Removal Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 54) would necessarily be unconstitutional. This Court, however, has in these very cases upheld the constitutionality of the Removal Act.

In the case of International Harvester Company of America v. Commonwealth of Kentucky, 234 U. S. 579, the rule is recognized, first, that a foreign cor-

poration engaged in interstate commerce only is not for that reason immune from the service of process under the laws of the state in which it is carrying on such business. It is also held, recognizing the doctrine laid down in the Davis v. Big Four case (cited supra), that the states may pass laws enforcing the rights of citizens, which affect interstate commerce, which fall short of regulating such commerce in the sense used in the Constitution (citing Sherlock v. Alling, 93 U. S. 99; Johnson v. Chicago & P. Elevator Co., 119 U. S. 388; Kidd v. Pearson, 128 U. S. 1; Pa. R. R. Co. v. Hughes, 191 U. S. 477; The Winnebago, 205 U. S. 354).

It is contended by the petitioner that where an attachment or garnishment law under a state statute is resorted to as an aid to the principal cause of action and the principal cause of action arises under a federal statute, that the character of the attachment or garnishment changes from remedial to substantive. By what species of ratiocination petitioner arrives at this conclusion is not at all clear, for the attachment or garnishment is something entirely distinct and separate from the cause of action proper and is merely incidental thereto, even petitioner admitting the last statement (Petitioner's Br., pp. 11 and 12).

In support of its statement, petitioner cites Laborde v. Ubarri, 214 U. S. 174, where the Court holds that

an attachment is but an incident to a suit, and unless jurisdiction can be obtained over the defendant his estate cannot be attached in a federal court. Obviously, this must be so in the federal court, where the federal rule requires personal service upon the defendant, but this argument advanced by petitioner falls of its own weight because of the fact that if personal service is not required in the main action, then the attachment or garnishment, as incidental actions, will lie. The validity of state attachment and garnishment statutes have been upheld so frequently and generally that we do not deem it necessary to expatiate upon them other than to refer to a few of the numerous cases.

Davis v. R. R., 217 U. S. 157;
Chicago, Rock Island & Pac. Ry. Co. v. Sturm, 174 U. S. 710;
Harris v. Balk, 198 U. S. 225.

Unless there is some special reason why an exception should be made in cases arising in interstate commerce, then the argument of the petitioner falls of its own weight. This brings us to the question as to whether or not a cause of action arising under an interstate commerce transaction presents any features different from those arising in other transactions. Can it be possible that state attachments, which have been upheld in thousands of cases, have

suddenly become invalid because the cause of action arose under an interstate commerce transaction? It would indeed require a long stretch of the imagination to see how a lawsuit perfectly legitimate in all respects can have any direct bearing or effect upon interstate commerce. This Court has repeatedly held that interstate commerce is not sufficiently affected or influenced by attachments under state statutes to render such attachments invalid, even where the vehicles of transportation, while standing idle in states, have been seized under attachment rights.

Davis v. R. R., 217 U. S. 157;
International Harvester Co. v. Kentucky, 234 U. S. 579;
Sherlock v. Alling, 93 U. S. 99;
Johnson v. Elevator Co., 119 U. S. 388;
Kidd v. Pearson, 128 U. S. 1;
Pa. R. R. Co. v. Hughes, 191 U. S. 477;
The Winnebago, 205 U. S. 354.

Upon what theory, then, can it be said that a garnishment, which may tie up traffic balances, and which in no way interferes with interstate commerce operations, can possibly constitute such a direct interference as to justify a revolution in the attachment laws of the states and abrogate the same? As has been said in a number of the decisions of this Court, interstate commerce is only remotely or indirectly affected by state attachments. Were this

Court to declare the state attachment and garnishment laws ineffective where the transactions out of which the original cause of action arises are interstate in character, the very purpose of the state laws which have so frequently been upheld by this Court would be undermined and destroyed. This Court was dealing with different situations in the Wells case and in the Davis Director General case. These cases exemplified types of litigation that were brought. This Court obviously was not in sympathy with the practice of cluttering up the dockets of the states involved in these cases with foreign litigation.

# POINTS AND AUTHORITIES.

## I.

Attachment under state statute on a nonresident defendant without personal service will lie upon interstate shipments when there is no interference with interstate commerce.

Davis v. Big Four R. R. Co., 217 U. S. 157;
Chicago, R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710;
Harris v. Balk, 198 U. S. 225;
Martin v. West, 222 U. S. 191.

## II.

The Carmack Amendment does not provide an exclusive remedy, but expressly provides "that the act shall not deprive any holder of a bill of lading of any remedy or right of action which he has under existing law."

Amendment of 1906 (Carmack Amendment) to Interstate Commerce Act of Feb. 4, 1887;
Ga. etc. R. Co. v. Blish Milling Co., 241 U. S. 190 (1916);
Bichlmeir v. Minn. R. Co., 159 Wis. 404;
Adams Express Co. v. Croninger, 226 U. S. 491;
Elliott v. Chicago etc. R. Co., 35 S. Dakota 57 (1915);

Western etc. R. Co. v. White Prov. Co., 142 Ga. 246 (1914).

III.

A proceeding in attachment is only incidental to a cause of action and is not the cause of action itself. It is remedial in nature and not a substantive right.

Revised Statutes of Missouri 1919, Sec. 1725;
Laborde v. Ubarri, 214 U. S. 174.

IV.

Garnishment is incidental to a suit in attachment, and, like attachment, may be brought in aid of the cause of action, but is not a cause of action proper. It is remedial in nature and not a substantive right.

Revised Statutes of Missouri 1919, Sec. 1846;
Tinsley et al v. Savage, 50 Mo. 141,
Evans-Snider-Buel Co. v. McFadden, 185 U. S. 505;
Rice et al. v. Adler-Goldman Com. Co., 71 Fed. 151;
Peoples Savings Bank and Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 124 (n. s.) App. 6035, 1 Fed. 130;
Hanscom v. Malden and Melrose Gaslight Co., 220 Mass. 8;
28 Corpus Juris, sec. 9, part C, also p. 19;
King v. Cross, 175 U. S. 396;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;

Heineman v. Schloss, 83 Mich. 153;
Philbrick v. Philbrick, 39 N. H. 468;
Freberg v. Singer, 90 Wis. 608;
Sears v. Seaboard Air Line R. Co., 3 Ga. A. 614;
Wheeler v. Chicago Title etc. Co., 217 Ill. 128;
Wooding v. Puget Sound Nat. Bank, 11 Wash. 527;
Klaus v. Green Bay, 34 Wis. 628.

V.

The construction placed upon attachment statute by the Supreme Court of the state is binding on the federal courts sitting in that state.

Rice et al. v. Adler-Goldman Commission Co., 71 Fed. 151;
Peoples Saving Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 1924 (n. s.) App. 6035, 1 Fed. 130.

VI.

A foreign corporation, licensed to do business in a state, and having an agent there, has the same right to bring suit in such state as a domestic corporation or an individual, and has the constitutional and statutory rights, both state and federal, of a domestic corporation, relating to the institution of suits.

Sidway v. Land and Live Stock Co., 187 Mo., l. c. 673;

McCabe v. R. R., 13 Fed. 827;
Railroad v. Harris, 12 Wall., p. 65;
Murphree Foreign Corporations, Sec. 247;
Express Co. v. Ware, 20 Wall. 543.

# ARGUMENT.

## I.

### History and Purposes of Attachments and Garnishments.

### A.

We wish to discuss very briefly the history and purposes of attachments and garnishments, for the purpose of showing the origin and purpose of these unusual proceedings and to show that attachments and garnishments are remedies and are procedural in character as opposed to substantive rights. Numerous definitions have been given of attachment, and the definition given in Corpus Juris is, perhaps, as good as any.

In 6 C. J., p. 28, Note 1, the following definition is taken from Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239:

> "The word 'attachment,' as ordinarily understood in American law, has reference to a writ, the object of which is to hold property to abide the order of the Court for the payment of a judgment in the event the debt shall be established."

Attachments may be used for two purposes, first, to compel the appearance of the defendant; second, to

seize and hold the property for the payment of debt, to collect which suit is brought.

We are not concerned here with the first kind, but the second kind of attachment was originally unknown at common law, and had its origin in England and grew out of the local custom of London merchants, whereby, if a judgment was affirmed and an execution was returned unsatisfied, the plaintiff had a right to garnishee the debtors of the defendant, and after certain proceedings were entitled to judgment. Personal service upon the defendant was not necessary, and the debt due the defendant could be reached. Therefore, the very purpose of the remedy by attachment would very frequently be defeated if personal service were required in state actions as contended for by the petitioner. Were a cause originally brought in the federal court it would be clear that personal service would be required, because this is the universal rule in federal courts. Were the remedy by attachment a substantive right in the sense that the Carmack Amendment made provision for bringing suits under the Carmack Amendment by attachment and in no other way, attachments would be the method prescribed by the act and would be a part of the cause of action. This is what petitioner has in mind when it contends that a substantive right is part of the cause of action, irrespective of whether brought in the federal court or whether in the state court. And so it is

where a statute of the state gives a cause of action which did not exist at common law and provides an exclusive method of procedure and remedy, this method and remedy must be pursued. But how does this apply to the Carmack Amendment, which nowhere provides that the suit must be brought by attachment or that personal service must be had? The Carmack Amendment is an additional remedy provided by Congress, and all the rights and remedies which have heretofore existed still remain intact. In other words, it is cumulative, and so the argument advanced by petitioner in petitioner's brief, on page 22, is without either form or substance in so far as it contends that suit cannot be commenced in the state court by attachment without personal service under the Carmack Amendment or the Federal Employers' Liability Act. Then it is contended by the petitioner that the phrase, "existing law," used in the Carmack Amendment, means existing common law as understood in the federal court and excludes changes effected as understood in the federal court. It is obvious that the construction placed upon this phrase in the case of Adams Express Co. v. Croninger, 226 U. S. 503, cited by petitioner, and the case of Lysaght v. Lehigh Valley R. Co., 254 Fed. 353, hereafter discussed, simply means that the state cannot pass legislation which would cause the proviso to destroy the act itself, but certainly it has no reference to the man-

ner of proceeding in the state court or to anything which pertains properly to the state forum, as said in the Lysaght case, and which is likewise quoted by petitioner: "The phrase, 'existing law,' means existing common law as understood in the federal courts and excludes changes effected by state statutes." Petitioner contends (Petitioner's Br., p. 9) that the common law referred to must be the common law of the federal courts. There is no such thing as a common law of the federal courts as distinguished from the common law of the state courts. A federal court enforces the common law of the state where it is sitting.

Bucha v. Cheshire R. Co., 125 U. S. 555;
Burgess v. Seligman, 107 U. S. 20.

**History of Carmack Amendment.**

Even at the risk of appearing to be repetitious we will set out briefly the history of the Carmack Amendment, as we believe it will throw some light upon the intention of Congress in enacting the amendment.

Prior to the passage of the Carmack Amendment in 1906 an interstate case against the initial carrier could have been maintained in either the federal or state courts, and anterior rights are expressly reserved by the Carmack Act. It was not the purpose of this act to abridge the shipper's remedies but to enlarge them.

In the case of Adams Express Company v. Croninger, 246-491, it is held that prior to the amendment the rule of the carrier's liability for the interstate shipment of property as enforced in both the federal and state courts was either that of the general common law as declared by that court and enforced in the federal courts of the United States, or that determined by the public policy of a particular state or that prescribed by the statute law of a particular state; but each carrier was responsible only for the loss occurring on its own line. Therefore, so much of the provision of the amendment as makes the carrier receiving goods for transportation to a destination beyond its own terminals responsible for loss or damage occurring on any portion of its own line is declaratory of the common law, and the only right of action given the legal holder of a bill of lading in interstate commerce shipments is against the initial carrier, where the primary cause of liability is upon the subsequent connecting carriers. This is expressly so held in St. Louis etc. R. Co. v. Mounts, 44 Okla., p. 359 (1914). The Court said: "The right of action against an initial carrier is extended to cases where the primary cause of liability is upon a subsequent connecting carrier, and in favor of the lawful holder of a bill of lading or receipt issued by the carrier; but it is further provided that such initial carrier may recover from such connecting carrier the amount of such loss,

damage or injury as it may be required to pay owners of property, etc. Except as to the said extension of the right of action to the cases specified above, namely, where the loss or damage occurs on the line of a connecting carrier, the Carmack Amendment **is merely affirmative of the pre-existing law** in this respect."

The manifest object of this provision of the statute is to enable one to contract with a common carrier for the carriage of goods to a part of another state over its lines, and over the connecting lines of other carriers and to recover damages directly from the carrier to whom the goods were delivered and by which the bill of lading therefor was issued, without being compelled to seek out and sue the particular carrier that occasioned the injury. The legal effect of the provision so far as it relates to a carrier is to impose upon it a legal liability to perform and complete by delivery at the destination every contract of interstate carriage into which it may enter for itself and for its connecting lines from which escape can be made neither by rules nor negligence of its own, or contract or consent of the shipper. The legal effect of the provision, so far as it relates to a shipper, is not to confer upon him a right to a new kind of contract, but to extend to him rather a new and additional remedy upon the kinds of contracts that he may heretofore have been able to make, by offering

him an opportunity to sue the carrier to whom the property was delivered for shipment under the liability imposed upon the carrier by the statute (Bowden v. Philadelphia etc. R. Co., 91 Atlantic, p. 209 (Del. 1914).

In the Croninger case, cited supra, the following language is used: "The liability thus imposed is limited to any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered, and plainly implies a liability for some default in its duty as a common carrier." In 241 U. S. 226 the Court said: "Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine heretofore approved by us in respect to a carrier's liability for loss occurring on its own line." To the same effect is Louisville etc. Ry. v. Brewer, 183 Ala., p. 172 (1913), and Cincinnati & Tex. Ry. v. Rankin, 241 U. S., l. c. 326.

By parity of reasoning, under the Carmack Amendment the connecting carriers are not relieved from liability for acts of negligence which occur on their respective lines, but each is liable for its own acts. This doctrine is expressly laid down in the case of Georgia etc. Ry. v. Blish Milling Co., 241 U. S., p. 190 (1916).

The Carmack Amendment merely places the shipper in a position where he may be able to recover for

injured or damaged property and relieve himself oftentimes from the task of locating the active tort-feasor, but if the shipper can locate the carrier which caused the damage he may sue that one alone (Elliott v. Chicago etc. R. Co., 35 S. Dakota 57 [1915]; Western etc. R. Co. v. White Provision Co., 142 Georgia 246 [1914]; Eastover Mules etc. Co. v. Atlantic Coast Line R. Co., 99 S. C. 470 [1914]; Louisville etc. R. Co. v. Lynne, 71 So. [Alabama 1916]; Coats v. New Orleans Term. Co., 139 Louisiana 958 [1916]; Newborn v. Louisville etc. R. Co., 170 N. C. 205 [1915]; St. Louis S. W. R. Co. v. Ray, 127 S. W. 281 [Tex. Civ. App. 1910]).

In Bichlmeir v. Minneapolis etc. R. Co., 159 Wis. 404 (1915), the Court uses the following language: "This amendment clearly gives the right of action against the initial carrier. But is such remedy exclusive?" So the remedy given by the amendment was additional to and concurrent with any other existing federal remedy. The question, therefore, arises whether under federal law prior to the enactment of the Carmack Amendment a shipper had a right of action against a carrier negligently causing the damage, but who was not the carrier with whom the initial contract of shipment was made. An affirmative answer to this question was given by the Supreme Court of the United States in the case of New Jersey S. N. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed.

465, and so far as we have been able to discover the rule there announced has remained unchanged. Such are also the uniform holdings of state courts. (See 1 Hutchinson, Carr [3d ed.], sec. 236, and cases cited; 4 Ruling Case Law, 404, and cases cited.) The reason of the rule that the owner of the goods may proceed directly against the carrier who is the actual wrongdoer, even if he has a remedy against the receiving carrier, is that each carrier is an agent of the owner authorized to contract with the connecting carrier for the safe transportation of the shipment, which, when undertaken by such carrier, becomes a contract with the owner, for a breach of which he can proceed directly against the carrier in default.

In the case of Duvall v. Louisiana Western R. Co., 135 La. 189, the Court uses the following language: "The object which Congress had in view in enacting that amendment is said by the Court in the case of Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 186, to have been simply to impose liability upon the initial carrier for the faults of the succeeding carrier, any agreement or stipulation to the contrary notwithstanding. There is nothing to lead us to suppose that Congress had the further object in view of doing away with the said rule of evidence. Congress was conferring a right of action. It was not dealing with the question of what evidences the Court should deem sufficient for the proof of a particular fact at issue

between the litigants. The said rule of evidence has absolutely nothing to do with the substantial rights of the parties. It is simply an aid to the Court in weighing the evidence. The plaintiff, having to prove that the loss occurred upon the defendant company's line, offers evidence going to show that the goods were received in good condition by the initial carrier, and, having made this proof, contends that it establishes the fact that the loss of, or damage to, the goods occurred on the line of the defendant company, and in support of that contention invokes this rule of evidence; and this rule of evidence comes in aid of the Court in that task. This case was followed in Chicago etc. R. Co. v. Harrington, 44 Okla. 41 (1914). In the case of Baltimore etc. R. Co. v. Sperber, 117 Md. 595 (1912), the Court held that the Carmack Amendment was therefore evidently intended to be cumulative and not to furnish an exclusive remedy. It is pointed out that where the shipper is required to use a terminal carrier at a great distance it works a hardship upon the carrier, and frequently results in a failure to recover because of his failure or inability to obtain the necessary evidence with which to prove his case. It is likewise argued that if the shipper were compelled to sue the initial carrier and under the Carmack Amendment would have no redress or recourse against the connecting or terminal carriers, great injustice might arise if the shipper were forced

to sue the initial carrier only. Clearly such was not the intent of Congress in enacting this legislation. In the case of New York etc. Transportation Line v. Baer, 118 Md. 73 (1912), the rule is laid down that where neither of the defendants is the initial carrier they are not in this case in anywise affected by the act of Congress called the Hepburn Act, with the amendment thereto known as the Carmack Amendment, and are, therefore, subject only to liability imposed upon them by the common law.

The question as to whether or not connecting or terminal carriers could be sued received consideration at the hands of the Georgia Appellate Courts with various results. The first time the case arose (Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102 (1913), it was decided that there was nothing in the Hepburn Act and in the Carmack Amendment which precluded a shipper from suing under the provisions of Section 3752 of the Georgia Civil Code of 1910. This rule, however, was expressly overruled in Southern R. Co. v. Bennett, 17 Ga. App. 162 (1915), where the Court ruled that the rights and remedies conferred by existing state laws where a shipment accepted by a carrier for interstate transportation has been lost were not continued in force by the proviso of the Carmack Amendment, and that the proviso only preserves rights or remedies that the holder of the bill of lading may have had under exist-

ing federal law at the time of the action; and the Court held that the terminal carrier could not be held, and that only the initial carrier could be held. However, this last case was expressly overruled in the case of Central of Georgia R. Co. v. Waxelbaum Produce Co., 89 S. E. 635 (Ga. App. 1916). The last decision is based upon the ruling of the Supreme Court of the United States in the Blish Milling case, cited supra, and unquestionably this is the correct doctrine and accords with the rulings of the Supreme Court of the United States and also of the state courts.

The Carmack Amendment has also received construction at the hands of the Missouri Supreme Court as enunciated in the case of Donovan v. Wells-Fargo & Co., 265 Mo. 291. The tenor of this decision is in accord with what has been said above, that in any state law or decision which conflicts with interstate commerce, provisions referred to above must give way; but we have shown above that the Carmack Amendment, except in so far as it provides an additional remedy to the shipper in permitting the initial carrier to be sued for the acts of negligence of connecting and terminal carriers involved in the shipment, is merely declaratory of the common law and the shipper has all of his rights of action against the initial carrier, connecting carriers, or the terminal carrier, depending upon whose act caused the damage, and providing further that the shipper can prove

such negligence of such carrier. In the case of Atchison etc. R. Co. v. Boyce, 171 S. W. 1094 (Tex. Civ. App. 1914), the Court said: "The act was passed for the benefit of the shipper. He can sue the initial carrier alone or any of the connecting carriers, or all jointly, for the damages. We do not understand that an election can be required where a party's rights are analogous, consistent, or concurrent. As we understand, under the Interstate Commerce Act, the contract is made by the initial carrier for all connecting carriers, by the terms of which each and all are bound, and a failure of duty or the negligence of either gives the shipper a right of action against either or all under the act against the initial carrier for all the damages and the connecting carriers for the damages occurring on their respective lines." In the case of Miller v. Chicago etc. R. Co., 85 Neb. 458 (1909), it was held that the Carmack Amendment does not in any manner supersede or amend the rule at common law with reference to the liability of a common carrier for its negligence in the transportation of property by interstate shipments.

III.

The trouble with petitioner's contention is that he is undertaking to transform a mere matter of procedure into a matter of substance, into a new right of action, and yet petitioner admits that an attach-

ment is but an incident to a suit, but petitioner states that unless the suit can be maintained the attachment must fall. In the federal court, because of the rule requiring personal service attachments, personal service must be obtained upon defendants in attachment suits, and suit cannot be maintained by attachment unless service is obtained, but in the state court, clearly the suit will lie, and even if the petitioner had the right of removal to the federal court, the sequestration of the property would remain intact by virtue of the federal statute, although only constructive service is had.

Removal Act, March 3, 1875, ch. 137;
18 Stat. L. 471;
Sec. 36, Jud. Code;
Clark v. Wells, 203 U. S. 164.

If petitioner's contentions were correct all suits and attachments brought in the state court would be dissolved upon removal to the federal court where personal service was not obtained and all judgments obtained upon such removal would be void. Obviously Congress did not desire that the convenient and necessary remedy by attachment in the state court be destroyed or impaired when it enacted the said statute. Why should any exception be made in the case of the Carmack Amendment or any other law which is highly remedial, and why should a construction be placed

upon the law which obviously does not appear there, which has no place in the law, and which was never intended to be in the law, merely for the convenience of railroads which seek to deprive shippers of remedies which exist, which should exist, and which Congress enacted for the purpose of securing justice for shippers? While a suit brought by attachment in the federal court cannot be maintained unless the main suit is maintainable, which in the federal court means that personal service must be had upon the defendant, yet the suit is maintainable in the state court through the statutory service, which may be constructive or by publication, and while a personal judgment cannot be obtained, a judgment is collectible to the extent of the goods or valuables sequestered. It follows, therefore, that if the petitioner's conclusions were accepted by this Court all state attachments brought as incidental to causes of action arising under federal statutes would be done away with; that such was not the intention of Congress is indicated by 34 Statutes at Large, page 1098, Sec. 36, Chapter 231, which has been heretofore adverted to.

Petitioner undertakes to show that an attachment in a state court is a substantive right rather than a mere matter of procedure in foreign attachments—that is, attachments against nonresidents. If this is true in one case why is it not true in all? It certainly would be illogical for any court to undertake

to hold that a foreign attachment in a state court is good in one case and not good in another, if attachment is a matter of substantive law. A glance at the cases cited by the petitioner show that they do not uphold petitioner's contention. They clearly deal in generalities, but do not fit the facts in the case at bar. For instance, in the case of Pritchard v. Dworkin, 106 U. S. 128, the general rule merely is laid down that whatever relates to the remedy and constitutes part of the procedure is determined by the law of the forum and whatever goes to the substance of the obligation and affects the rights of the parties is governed by the law of the contract. We fully concur in this pronouncement of a legal principle, but as we shall presently conclusively show, attachment is procedural and a part of the remedy, and, therefore, these cases have no application. And so in the case of White v. Railway Co., 238 U. S., p. 511, cited by petitioner, the same rule of law is announced and it is there held that the burden of proof as to contributory negligence is a substantive right rather than a mere matter of state procedure because the degree of contributory negligence directly affects the question of recovery, while attachment only indirectly does so and has nothing to do with the merits of the main cause of action. And so the case of Slater v. Ry. Co., 194 U. S. 126, cited on page 16 of petitioner's brief, has no application because this case merely

holds that where a cause of action is given by a statute the defendant must obtain the benefit of whatever limitations on his liability the said law imposes. There is a long line of authorities which hold that attachment is an ancillary remedy.

In Parks Co. v. City of Decatur, 138 Fed. 553, it is held that an attachment is an ancillary remedy (citing 4 Cyc, p. 398).

In Evans-Snider-Buel Co. v. McFaddin, 105 Fed. 293, 58 L. R. A. 900, affirmed in 185 U. S. 505, it is held that a right of attachment is nothing more than a remedy afforded by law for the collection of a debt. It is like a capia ad respondendum and a remedy of that nature may be abolished by the Legislature which created it. This doctrine is approved in Bank v. Reithman, 79 Fed. 582; Lears v. Seaboard Air Line Ry. Co., 3 Ga. App. 621; Stevenson v. Doe, 8 Blackf. (Ind.) 506.

In Lowenthal v. Hodge, 120 Appellative Div. 304, 104 N. Y. S. 120, it is held that an attachment is merely a possessory process.

These cases hold that garnishment is an auxiliary proceeding, growing out of and dependent upon another original or primary action or proceeding, and this, regardless of whether it is resorted to in aid of a pending action before judgment or in aid of an execution for the enforcement of a judgment recovered in the principal action or proceeding, or is com-

menced concurrently with the principal action, as where attachment is instituted by service of a writ of garnishment, or even where the statute authorizes the service of the garnishment writ before service by publication upon the principal defendant. This rule runs through the whole procedure to procure and sustain a garnishment, and, where the principal action fails, the garnishment also fails. Conversely, where there has been neither personal service nor general appearance by defendant in the principal action, such action is in a way dependent upon the validity of the garnishment proceeding. The same is true where the action is commenced by garnishment process.

28 Corpus Juris, p. 21;
Pratt v. Albright, 9 Fed. 634, 10 Bliss 511 (under Wisconsin statute);
Bear v. Hays, 36 Ill. 280;
Maynards v. Cornwell, 3 Mich. 309;
Wilson v. Pennoyer, 93 Minn. 348, 101 N. W. 502;
Martin v. Harvey, 54 Miss. 685;
Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906, 6 Ann. Cas. 751;
State v. Hughes, 135 Mo. A. 131, 115 S. W. 1069;
Tinsley v. Savage, 50 Mo. 141;
Field v. Sammis, 12 N. M. 36, 73 P. 617;
Perea v. Colorado Nat. Bank, 6 N. M. 1, 27 P. 322;
Kelly v. Gibbs, 84 Tex. 143, 19 S. W. 380, 563;

Durham v. Scrivener (Civ. A.), 228 S. W. 282;
Townsend v. Fleming (Civ. A.), 64 S. W. 1006;
Kelly v. Ryan, 8 Wash. 536, 36 P. 478;
Garland v. McKittrick, 52 Wis. 261, 9 N. W. 460.

**Remedial Character of Garnishments.**

Statutes authorizing garnishment are remedial, in that they pertain to and affect a remedy as distinguished from a right. This rule finds its principal application in connection with the validity of garnishment statutes and their construction.

28 Corpus Juris, p. 19;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;
Lears v. Seaboard Air Line R. Co., 3 Ga. A. 614, 60 S. E. 343;
Wheeler v. Chicago Title etc. Co., 217 Ill. 128, 75 N. E. 455;
Heineman v. Schloss, 83 Mich. 153, 47 N. W. 107;
Wooding v. Puget Sound Nat. Bank, 11 Wash. 527, 40 P. 223;
Freiberg v. Singer, 90 Wis. 608, 63 N. W. 754;
Klaus v. Green Bay, 34 Wis. 628.

**Validity, Construction, Operation and Effect of Garnishment Statutes Generally.**

The validity of garnishment statutes are tested by the rules in determining the validity of remedial

**statutes generally.** And, aside from the rule that the constitutional guaranty against impairment of the obligation of contracts applies only to retroactive statutes, garnishment statutes do not come within such guaranty, either because of provisions for discharge of the debt garnished without direct payment to the original creditor, according to the obligation of the original contract, or because the place of payment may incidentally be changed. In arriving at the proper interpretation of garnishment statutes, recourse should be had to the rules controlling and aiding the construction of statutes generally, with specific reference to the rules applicable to remedial laws.

28 Corpus Juris, Sec. 9, part c;
King v. Cross, 175 U. S. 396;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;
Heineman v. Schloss, 83 Mich. 153;
Philbrick v. Philbrick, 39 N. H. 468;
Freiberg v. Singer, 90 Wis. 608.

**Original or Auxiliary Process.**

Although some statutes have made attachment an original process for the commencement of a suit, the proceeding is usually a mere provisional remedy ancillary to an action commenced at or before the time when the attachment is sued out. Being of this nature, the attachment does not affect the decision

of the case upon the merits and the judgment in the main action neither changes the nature nor determines the validity of the attachment, and, if the attachment be dissolved, this alone will not necessarily defeat the action. An attachment proceeding is so independent of the main action that an order in such proceeding may, when final, be the subject of appeal during the pendency of the main action.

IV.

Furthermore, the federal rule is that the construction placed upon an attachment statute by the Supreme Court of a state is binding on the Federal Court sitting in that state.

Rice et al. v. Adler-Goldman Commission Co., 71 Fed. 151;

People's Savings Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. A., 1264 U. S. App. 6035, 1 Fed. 130.

The Missouri Supreme Court holds that attachments and garnishments are procedural.

State ex rel. St. L. & B. R. R. Co. v. Taylor, 298 Mo. 474.

**Analogy of Federal Employers' Liability Act to Carmack Amendment in so far as Bringing Suit in a State Court Is Concerned.**

The Federal Employers' Liability Act, as amended in 1910, provides that an action may be brought in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.

It also provides that a cause of action brought in a state court shall not be removed to the federal court. The law applicable, therefore, must be the state statute, and the law applicable in this respect to a cause of action is the same as that applicable to any other cause of action brought against the same defendant.

> Thornton's Federal Employers' Liability Act, 3rd Ed., p. 289.

The learned writer holds that the state statute not only controls the state procedure, but also the law relating to the venue.

In conclusion, we desire to call the Court's attention to the argument of petitioner that it would be unfair to compel carriers to litigate matters far from their homes (Petitioner's Brief, p. 22). Petitioner

also states that such litigation is costly. Surely petitioner is not serious. We must assume that petitioner would not indulge in frivolities in the highest tribunal in the land, and, therefore, we make reply to the argument by asking who is in a better position to litigate away from home, the carrier, with its skilled corps of experts, its unlimited resources, and its ability to offer passes to witnesses, or the shipper, who has to hire an attorney and who has to pay the expenses, including the railroad fare of witnesses and who lacks the resources and organization of the carrier? Where the initial carrier is sued at the destination, the initial carrier can immediately notify the connecting carrier and the terminal carrier to come in and defend the suit, or to aid in the defense, while to force the shipper to go to the domicile of the initial carrier will virtually deprive the shipper of the benefits of the Carmack Amendment. Had such been the intention of Congress this intention undoubtedly would have been clearly expressed and as part of the Carmack Amendment, Congress would have enacted the proviso that the shipper must go to the domicile of the initial carrier to bring suit, because, in the big majority of cases, the initial carrier does not live in the same domicile with the shipper, and, therefore, personal service cannot be obtained. If he did live there, there would be no occasion to sue the connecting or terminal carriers, except in the case

of insolvency of the initial carrier. The shipper's common-law rights and remedies against each carrier remain intact. The Carmack Amendment merely adds an additional remedy, which is and should be highly remedial. It would be difficult, indeed, to believe that any court would place such a construction on the Carmack Amendment as to virtually destroy its effectiveness. We believe this Court should so construe the Carmack Amendment as to give the correct effect to the intention of Congress, which was to provide an enactment which would be highly remedial and which would enable the shipper to obtain a complete and speedy recovery against the carriers transporting shipments, leaving the question of liability to be settled between these carriers, since the carriers know or can readily ascertain where the fault lies, while it would be virtually impossible for the shipper to ascertain this, and even where he can ascertain it, he can only do so at a prohibitive expense.

The petitioner makes the statement (p. 1, Petitioner's Brief) that this action is based upon the Carmack Amendment for damages **presumed** to have accurred upon the line of the delivering carrier. Is there such a presumption under the Carmack Amendment? Does not the Carmack Amendment do away with the presumption, against the terminal carrier, so far as the shipper is concerned, and provide for the

liability of the initial carrier, irrespective of which carrier actually caused the loss or damage? This must be correct, since the courts have held that the acts of the connecting and terminal carriers are the acts of the initial carrier, as the former are agents of the latter under the Carmack Amendment.

Obviously, the construction contended for by petitioner would frustrate the very purpose of the Carmack Amendment and would make an unfair distinction in favor of railroads and against other persons.

Why make a distinction where railroads are involved? Constitutional law is constitutional law whether applied to giant railroads or to humble shippers. The principles of law applicable are the same. The facts in the case at bar present a usual and ordinary situation for the invocation of the statutory remedy of attachment. The courts of this state unquestionably would have jurisdiction to attach moneys due from any person out of this state to any person in this state, and, after all, when the facts in this case are fully analyzed, they simply amount to a like situation. There is money in Missouri belonging to a nonresident corporation and due to a corporation in this state. Therefore, the state court had jurisdiction to attach the money in the hands of the Illinois Central Railroad Company just as this state would have a right to afford a remedy by attachment against any individual. The tempo-

rary writ should therefore be quashed, and we respectfully request that the same be done.

Respectfully submitted,

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*Reversed.*

## STATE OF MISSOURI EX REL. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY *v.* TAYLOR, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 89. Argued October 17, 1924.—Decided November 17, 1924.

1. A judgment of a state Supreme Court denying an application for a writ of prohibition to prevent a lower court from entertaining jurisdiction by garnishment over an action against a foreign railroad corporation for damage to an interstate shipment, *held* a final judgment, and reviewable in this Court by certiorari, but not by writ of error. P. 206.
2. A Delaware corporation, having a usual place of business in Missouri, brought an action in a Missouri court against a Texas corporation which operated a railroad in Texas only and had no place of business, nor had consented to be sued, in Missouri, the cause of action being damage, done possibly in Missouri, to freight shipped to that State from Texas, over defendant's line, on a through bill of lading, and the basis of jurisdiction in Missouri

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[a] The proceeding before the Commission, which was instituted by the Manufacturers Association of York, sought an order requiring the three railroads: (a) to interchange at York all traffic originating in or destined to that city; (b) to permit common use by all the carriers of all terminal facilities at York, including the main-line tracks for a reasonable distance outside the terminals; and (c) to establish reciprocal switching throughout the city.

being the garnishment of traffic balances due the defendant from a connecting interstate carrier having a place of business there. *Held:*

(a) That the Missouri attachment law, by requiring interstate carriers to submit to garnishment in such circumstances, did not unreasonably burden interstate commerce. P. 207.

(b) The fact that the cause of action arose under an act of Congress (the Carmack Amendment), and could not be entertained originally by a federal court in Missouri without personal service on the defendant, was not an obstacle to its enforcement in the state court by garnishment. P. 207.

3. When Congress creates a right of action and makes no provision concerning the remedy, the federal and state courts have concurrent jurisdiction, and the plaintiff choosing a state court is entitled to whatever remedial advantage inheres in the forum. P. 208.

4. No peculiarity of state procedure can enlarge or abridge a substantive federal right; but to enforce a federal claim by subjecting property within the State to its satisfaction through attachment does not enlarge the substantive right. P. 209.

298 Mo. 474, affirmed.

ERROR and certiorari to a judgment of the Supreme Court of Missouri denying an application for a writ of prohibition to stop proceedings in a lower court of the State.

*Mr. M. U. Hayden*, with whom *Mr. H. H. Larimore*, *Mr. James F. Green* and *Mr. Thos. T. Railey* were on the brief, for plaintiff in error and petitioner.

Since service by attachment is not permissible in the federal courts, and the right of action is based upon a federal statute, the attachment law of the State cannot be resorted to. To do so would affect substantive rights rather than matters of mere procedure. This contrary ruling is challenged on the ground that it violates both the due process clause and the commerce clause of the Federal Constitution, and is contrary to the decisions of this Court in *Charleston, etc., Ry. Co.* v. *Varnville Co.*, 237 U. S. 604; *New York Cent. R. R. Co.* v. *Winfield*, 244

U. S. 153; *Pryor* v. *Williams*, 254 U. S. 43; *Central Vermont Ry. Co.* v. *White*, 238 U. S. 511; *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312.

The Carmack Amendment having superseded all state laws as to proceedings for damages to interstate shipments, the right of defense by carriers sued on causes of action arising under the act is a substantive right which cannot be defeated or abridged by a state statute. *Davis* v. *Wechsler*, 263 U. S. 22; *Davis* v. *Farmers Co-operative Co., supra; Central Vermont Ry. Co.* v. *White, supra; Southern Ry. Co.* v. *Prescott*, 240 U. S. 641; *Lysaght* v. *Railroad Co.*, 254 Fed. 353; *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 206; *Galveston, etc., Ry. Co.* v. *Wallace*, 223 U. S. 491; *Adams Express Co.* v. *Croninger*, 226 U. S. 503, 507.

Federal laws govern as to actions against nonresident defendants under the act, and there should be no proceeding without personal service. *Charleston, etc., Ry. Co.* v. *Varnville Co., supra; Pratt* v. *Railway Co.*, 284 Fed. 1007; *Haddock* v. *Haddock*, 201 U. S. 562; *Davis* v. *Farmers Co-operative Co., supra; Pennoyer* v. *Neff*, 95 U. S. 726; *Big Vein Coal Co.* v. *Read*, 229 U. S. 38; *Laborde* v. *Ubarri*, 214 U. S. 173; *Levy* v. *Fitzpatrick*, 15 Pet. 171; *Ex parte Railway Co.*, 103 U. S. 796; *Toland* v. *Sprague*, 12 Pet. 329.

Personal service, as distinguished from service by foreign attachment, is a substantive right rather than a mere matter of procedure. *Pritchard* v. *Norton*, 106 U. S. 124, 128–136; *Central Vermont Ry. Co.* v. *White, supra; Southern Ry. Co.* v. *Gray*, 241 U. S. 338–9; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 371; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 126; *Southern Ry. Co.* v. *Prescott, supra; American Ry. Exp. Co.* v. *Levee*, 263 U. S. 19; *Davis* v. *Farmers Co-operative Co., supra; Davis* v. *Wechsler, supra; Harland* v. *Telegraph Co.*, 40 Fed. 311; *Butler* v. *Young*, 1 Flip. 276; *Pratt* v. *Railway Co., supra.*

It is apparent from the foregoing decisions that the initial carrier, in an action based upon the Carmack Amendment, cannot be sued in any federal court other than one in which personal service can be obtained. State legislatures cannot add to this federal right the further right that Congress has not seen fit to grant, namely, a right to sue in a jurisdiction in which defendant is not doing business. See *Charleston, etc., Ry. Co.* v. *Varnville Co., supra*, 597.

Since the full faith and credit clause does not require one State to respect the judgment of another State based upon service by publication, *Haddock* v. *Haddock*, 201 U. S. 562, it follows that personal service must be a substantive right rather than a mere matter of procedure, for certainly no court has ever held that full faith and credit should not be given to the judgment of a foreign State merely because of the practice and procedure in the trial of the case which led to the judgment. As to such matters of practice and procedure the judgment is conclusive, but with respect to such substantive rights as that of personal service the judgment is not conclusive. *Pennoyer* v. *Neff, supra*, 726.

*Mr. J. L. London*, with whom *Mr. John S. Leahy*, *Mr. Walter H. Saunders* and *Mr. Lambert E. Walther* were on the brief, for defendant in error and respondent.

Attachment under state statute on a nonresident defendant without personal service will lie upon interstate shipments when there is no interference with interstate commerce. *Davis* v. *Cleveland, C. C. & St. L. Ry Co.*, 217 U. S. 157; *Chicago, R. I. & P. R. R. Co.* v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 225; *Martin* v. *West*, 222 U. S. 191.

The Carmack Amendment does not provide an exclusive remedy, but expressly provides "that the act shall not deprive any holder of a bill of lading of any remedy or

right of action which he has under existing law." *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *Bichlmeir* v. *Minnesota R. R. Co.*, 159 Wis. 404; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Elliott* v. *Chicago, etc., R. Co.*, 35 S. Dak. 57; *Western, etc., R. R. Co.* v. *White Prov. Co.*, 142 Ga. 246.

A proceeding in attachment is only incidental to a cause of action and is not the cause of action itself. It is remedial in nature. Mo. Rev. Stats. 1919, § 1725; *Laborde* v. *Ubarri*, 214 U. S. 174.

Garnishment is incidental to a suit in attachment, and, like attachment, may be brought in aid of the cause of action, but is not a cause of action proper. It is remedial, and not a substantive right. Mo. Rev. Stats. 1919; § 1846; *Tinsley* v. *Savage*, 50 Mo. 141; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505; *Rice* v. *Adler-Goldman Co.*, 71 Fed. 151; *Peoples Saving Bank & Trust Co.* v. *Batchelder-Egtas Co.*, 1 Fed. 130; *Hanscom* v. *Malden & Melrose Co.*, 220 Mass. 8; 28 Corpus Juris, § 9, part C, also p. 19; *King* v. *Cross*, 175 U. S. 396; and other state cases.

The construction placed upon an attachment statute by the Supreme Court of the State is binding on the federal courts sitting in that State. *Rice* v. *Adler-Goldman Co., supra; Peoples Saving Bank & Trust Co.* v. *Batchelder-Egtas Co.*, 1 Fed. 130.

A foreign corporation, licensed to do business in a State, and having an agent there, has the same right to bring suit in such State as a domestic corporation or an individual, and has the constitutional and statutory rights, both state and federal, of a domestic corporation, relating to the institution of suits. *Sidway* v. *Land Co.*, 187 Mo. 673; *McCabe* v. *Railroad*, 13 Fed. 827; *Railroad Co.* v. *Harris*, 12 Wall. 65; Murphree, Foreign Corporations, § 247; *Express Co.* v. *Ware*, 20 Wall. 543.

The ruling of the court below giving the shipper the right to bring suit by attachment is not an interference with interstate commerce. Distinguishing *Charleston, etc., Ry. Co.* v. *Varnville Co.*, 237 U. S. 604; and *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 153. In the case at bar the bringing of the attachment has nothing to do with the interstate shipment, but is merely an incident to a suit, being procedural and affecting the remedy. *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505; *Rice* v. *Adler-Goldman Co.*, 71 Fed. 151; *Peoples Saving Bank & Trust Co.* v. *Batchelder-Egtas Co.*, 1 Fed. 130; *Hanscom* v. *Malden & Melrose Co.*, 220 Mass. 8; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412; cf. *Pryor* v. *Williams*, 254 U. S. 43, and *Central Vermont Ry. Co.* v. *White*, 238 U. S. 511.

Attachment is not an interference with interstate commerce. Discussing and distinguishing, *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Davis* v. *Cleveland, C., C. & St. L. Ry. Co.*, 217 U. S. 157.

See Interstate Commerce Act, § 22; § 20, par. 11; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–7; *Adams Express Co.* v. *Croninger* 226 U. S. 491, 507–8.

It is clear from the cases last cited that all the rights and remedies not inconsistent with the provisions of the Interstate Commerce Act remained in force and effect after the passage of the Carmack Amendment. Attachment, being merely a statutory form of remedy, would not be inconsistent with any provision of that act or with any provision of the Amendment.

If the imposition of an attorney's fee is permissible under a state statute, *Missouri, K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, certainly the remedy of attachment in the state court would entail no additional burden and would

remain open to the shipper. Judicial Code, § 36, and the decisions and practice in the federal courts, recognize and give effect to attachments in state courts. *Clark* v. *Wells*, 203 U. S. 164.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The American Fruit Growers, Inc., a Delaware corporation with a usual place of business in Missouri, brought an action against the St. Louis, Brownsville & Mexico Railway Company in an inferior court of Missouri. Jurisdiction was asserted solely by reason of the garnishment of traffic balances due from a connecting interstate carrier having a place of business in Missouri. The Brownsville Company is a Texas corporation; operates its railroad solely in that State; has no place of business in Missouri; and has not consented to be sued there. The cause of action sued on consisted of three claims of a consignee for damages to freight originating in Texas on lines of the Brownsville Company and shipped on through bills of lading to points in other States.

The Brownsville Company did not enter an appearance, general or special. Instead, it instituted in the Supreme Court of Missouri an application for a writ of prohibition—the proceeding here under review—praying that the judge of the inferior court be enjoined from taking cognizance of the pending action because he lacked jurisdiction. The highest court of the State denied relief. 298 Mo. 474. The case is here on writ of error; and also on certiorari, 263 U. S. 696. The suggestion was made, at the argument, that this Court is without jurisdiction, because the judgment below was not final. The contrary is settled. The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review. *Detroit & Mackinac Ry. Co.* v. *Mich-*

*igan Railroad Commission*, 240 U. S. 564, 570. The writ of error must, however, be dismissed for another reason. See *Stadelman* v. *Miner*, 246 U. S. 544.

The claim that the inferior court of Missouri lacked jurisdiction of the action for damages is rested on two grounds. One contention is that the Missouri attachment law, as construed and applied, is void under the rule of *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312, and *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101. The facts of this case differ vitally from those involved there. Here, the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the State; the shipment out of which the cause of action arose was of goods deliverable in Missouri;[1] and, for aught that appears, the negligence complained of occurred within Missouri. To require that, under such circumstances, the foreign carrier shall submit to suit within a State to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce.

The other contention is more strenuously urged. It is argued that the cause of action on which the consignee sues is the liability of the initial carrier for a loss occurring through the negligence of a connecting carrier; that this liability arises out of a federal law, Carmack Amendment, June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 595; that the conditions under which the federal right may be enforced are the same whether the plaintiff proceeds in the state court or the federal court; that original jurisdiction could not have been obtained by attachment in a federal court for Missouri, because personal service could not be made upon the Brownsville Company, *Ex*

[1] This is true only of one of the three shipments on account of which the action was brought. But if the inferior court had jurisdiction as to any one, it was obviously proper to deny the writ of prohibition.

*parte Railway Co.*, 103 U. S. 794; *Big Vein Coal Co.* v. *Read*, 229 U. S. 31; and that, therefore, no court of the State could entertain a suit to enforce the claim.

The argument is unsound. Congress created the right of action. It might have provided that the right shall be enforceable only in a federal court. It might have provided that state courts shall have concurrent jurisdiction only of those cases which, by the applicable federal law, could, under the same circumstances, have been commenced in a federal court for the particular State. But Congress did neither of these things. It dealt solely with the substantive law. As it made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction. *Galveston, etc., Ry. Co.* v. *Wallace*, 223 U. S. 481, 490. The federal right is enforceable in a state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws. *Second Employers' Liability Cases*, 223 U. S. 1, 56–7; *Claflin* v. *Houseman*, 93 U. S. 130, 136–7.

Missouri conferred jurisdiction over claims of this nature upon the court in which the consignee sued. Under its law, this jurisdiction may be exercised, to the extent of applying property attached to the satisfaction of a claim, even though personal service cannot be made upon the defendant. That remedy is one which was not available to the consignee in the federal court for Missouri. But this fact is not of legal significance. Compare *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. The origin of the right does not affect the manner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S.

211, 221. No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199; *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *Yazoo & Mississippi Valley R. R. Co.* v. *Mullins*, 249 U. S. 531. But to enforce a claim by subjecting property within the State to its satisfaction, through attachment proceeding, does not enlarge the substantive right.

The practice of obtaining in this way satisfaction of a claim *in personam* against an absent defendant is not one abhorrent to, or uncommon in, federal courts. In admiralty, district courts take original jurisdiction under such circumstances. *Atkins* v. *Disintegrating Co.*, 18 Wall. 272. At law, they do so on removal. When the case is removed, it proceeds to judgment in the federal court and the judgment is enforced there as against the attached property with the same effect as if the cause had remained in the state court. *Clark* v. *Wells*, 203 U. S. 164.

*Writ of error dismissed.*
*Judgment affirmed.*